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Precertification Settlement of Class Actions: Will California Follow the Federal Lead?

by
J. SPENCER SCHUSTER*

The captioned parties to proposed class action lawsuits often find it mutually advantageous to settle their individual claims long before a trial on the merits is ever contemplated seriously.[1] The expense of notifying absent class members of a proposed settlement and the cumbersome procedures that accompany the dismissal of a certified class action suit encourage class action attorneys to negotiate settlements of the named plaintiffs' individual claims prior to judicial recognition of the class. The state and federal courts that have monitored this circumvention of the conventional certification process have done so in a vast procedural vacuum. Unfortunately, the solutions devised by these courts often have exacerbated existing problems.

The allure of these precertification settlements[2] is not difficult to conceptualize: a defendant, believing that the plaintiffs initiating the suit

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1. "[I]n practice, few class actions are fully litigated. Most class actions for damages are either dismissed before trial or settled." *Developments in the Law: Class Actions,* 89 HARV. L. REV. 1318, 1373 (1976) [hereinafter *Harvard Study*].

One empirical study of class and derivative actions brought against the 190 largest publicly held corporations, as determined by *Fortune* magazine's 1975 survey, concluded that 71% of all suits filed were settled before reaching a trial on the merits. An additional 17% were dismissed, and 4% were denied class status. According to the study, only a paltry 4% of all class actions and shareholder derivative suits filed were litigated fully. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits,* 60 B.U.L. REV. 542, 544-47 (1980).

An earlier study of class actions filed in the federal courts in the District of Columbia revealed that 63% of the cases were settled or dismissed prior to the certification decision. Of those cases that proceeded beyond the certification stage, 55% were disposed of on preliminary motions in favor of the defendant. *See* Note, *The Rule 23(b)(3) Class Action: An Empirical Study,* 62 GEO. L.J. 1123, 1135-38 (1974) (authored by Bruce I. Burtelson, Mary S. Calfee, and Gerald W. Connor).

2. In this Note, the term "precertification settlement" refers only to settlements or compromises of the claims of individual members of the alleged class negotiated prior to certification. Such settlements typically involve only the captioned parties and are without prejudice to the absent putative class members.

The term is *not* used to refer to "class-wide settlements," the purpose of which is to bind

are likely to be the only potential claimants, may be willing to settle with

even absent class plaintiffs to the terms of the settlement agreement. For a valid class-wide settlement, the class must be certified in connection with the settlement. In the typical scenario,

> [t]he parties simply agree on what the class is. The defendant agrees not to challenge certification if the judge approves the settlement. The members of the temporary class are simultaneously notified of the pending suit, the class certification, and the settlement. All loose ends are tied up. Everything is approved, and everyone lives happily ever after.

Kempf & Taylor, *Settling Class Actions,* 13 LITIGATION 26, 29 (Fall 1986); *see also* AMERICAN COLLEGE OF TRIAL LAWYERS', RECOMMENDATIONS ON MAJOR ISSUES AFFECTING COMPLEX LITIGATION 32-34 (Feb. 27, 1981) (suggesting that "tentative settlement classes" are a valuable "device for avoiding the waste of judicial resources") [hereinafter TRIAL LAWYERS RECOMMENDATIONS]. If the settlement fails for any reason, the defendant will have reserved the right to withdraw the stipulation conceding the existence of the class and object to class certification de novo. *See* 2 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 11.22, at 418 (2d ed. 1985).

These "tentative settlement classes," which are designed to ensure that the settlement receives the broadest possible res judicata effect, have provoked a considerable amount of controversy. *Compare* MANUAL FOR COMPLEX LITIGATION § 1.46, at 63 (5th ed. 1982) [hereinafter MANUAL] (suggesting that tentative settlement classes "should ordinarily not be formed") *with* NEWBERG, *supra,* § 11.27, at 425-32 (finding the Manual's position "questionable" and advocating the creation of temporary settlement classes as a means of resolving major class action disputes) *and* TRIAL LAWYERS RECOMMENDATIONS, *supra,* at 33 ("Ultimately, the Manual ignores both the considerable value to the system of settling large class actions and the importance of settlement classes as a means of encouraging settlement."). The new Manual is somewhat more restrained, suggesting that the courts should be "wary" and use "great caution" when certifying a class for purposes of settlement only. MANUAL FOR COMPLEX LITIGATION, SECOND § 30.45, at 243 (1986) [hereinafter MANUAL (SECOND)].

Despite legitimate concerns about the possible circumvention of rule 23 safeguards, the use of these tentative settlement classes in federal courts is firmly established. *See, e.g.*, Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982) (court permitted creation of temporary settlement class but subjected the settlement's fairness, reasonableness, and adequacy to heightened scrutiny), *cert. denied,* 464 U.S. 818 (1983); *In re* Beef Indus. Antitrust Litig., 607 F.2d 167, 174 (5th Cir. 1979) (temporary settlement classes favored "when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge"), *cert. denied,* 452 U.S. 905 (1981); *In re* Baldwin-United Corp., 105 F.R.D. 475, 478-79 (S.D.N.Y. 1984) (tentative class certification approved for settlement purposes only); *In re* Mid-Atlantic Toyota Antitrust Litig., 564 F. Supp. 1379, 1388-90 (D. Md. 1983) (creation of temporary settlement class approved); *accord* Kusner v. First Pa. Corp., 74 F.R.D. 606, 612 (E.D. Pa. 1977); Florida Power Corp. v. Granlund, 82 F.R.D. 690, 693-94 (M.D. Fla. 1979) (observing that "the formation of tentative settlement classes is a recognized and useful tool for the amicable disposition of sometimes otherwise unmanageable class suits," but refusing to permit the establishment of such a class on the facts before it); Alaniz v. California Processors, Inc., 73 F.R.D. 269, 277-78 (N.D. Cal.) (acknowledged the need for extracare when confronted with tentative settlement classes but approved the use of a tentative settlement class when the plaintiff lost no leverage, there was added protection against a sell out, and the adequacy of representation was well litigated and closely-scrutinized), *modified,* 73 F.R.D. 289 (N.D. Cal. 1976), *aff'd,* 572 F.2d 657 (9th Cir.), *cert denied,* 439 U.S. 837 (1978); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 712 (S.D.N.Y. 1970) (approving proposed compromise settlement and dismissing with prejudice all claims of the classes), *aff'd,* 440 F.2d 1079 (2d Cir. 1971), *cert. denied,* 404 U.S. 871 (1972). *But see In re* Gen. Motors Corp. Engine

the named plaintiffs alone even though such a settlement affords less protection than a binding class-wide settlement. Other considerations, ranging from the legitimate to the duplicitous, also may set the settlement machinery in motion.

From a defendant's standpoint, concerns about the adverse publicity often generated by the filing of a class action lawsuit and the potential for vast exposure to damages militate strongly—and, indeed, legitimately—in favor of early settlement.[3] Likewise, from the named plaintiff's perspective, an earnest desire to obtain an adequate, speedy, and cost-efficient settlement would seem legitimate. It is no secret, however, that class actions often are instituted against carefully selected defendants[4] solely to obtain lucrative cash settlements[5] for the named plaintiffs and fees for their attorneys.[6] Alternatively, a defendant may be tempted to

Interchange Litig., 594 F.2d 1106, 1129 n.38 (7th Cir.) (adverting to the "inadvisability of creating tentative subclasses for settlement purposes without careful examination of the adequacy of the representation of *each* subclass") (emphasis in original), *cert. denied,* 444 U.S. 870 (1979); McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 420 (7th Cir. 1977) ("The suggestion of the [Manual] that there should be a class action determination before any settlement negotiations occur wisely provides for the majority of cases."); Lyon v. Arizona, 80 F.R.D. 665, 669 (D. Ariz. 1978) (holding that plaintiffs' negotiation of settlement, without seeking damages for the unnamed plaintiffs who would be bound by principles of res judicata in the event that the tentative class was certified, rendered them inadequate representatives of the class); Smith v. Josten's Am. Yearbook Co., 78 F.R.D. 154, 169 (D. Kan. 1978) (same), *aff'd,* 624 F.2d 125 (10th Cir. 1980); Arellano v. Arizona, 18 Fair Empl. Prac. Cas. (BNA) 1392, 1393 (D. Ariz. Dec. 14, 1977) (same).

While an extended discussion of class-wide settlement devices is outside the scope of this Note, this author suggests that the use of tentative settlement classes is consistent with the functional approach to precertification settlement issues advocated herein. At the very least, "some of the money that might otherwise be spent on certification trench warfare can be used to fund a litigation peace treaty." Kempf & Taylor, *supra,* at 29.

3. *See generally* 2 H. NEWBERG, *supra* note 2, § 11.04, at 401-02 (Positive Factors Affecting Settlement Possibilities).

4. Except where otherwise noted, this Note does not address defendant class action suits. Though both federal and California procedural schemes authorize actions *against* a class of defendants, the defendant class action poses a unique set of problems best treated independently. *See* CAL. CIV. PROC. CODE § 382 (West 1973) (providing that "one or more may sue or *defend* for the benefit of all") (emphasis added); FED. R. CIV. P. 23(a) ("One or more members of a class may sue or *be sued* as representative parties on behalf of all . . . .") (emphasis added). For an expanded discussion of lawsuits brought against a class of defendants, see 1 H. NEWBERG, *supra* note 2, §§ 4.45-4.70, at 372-421.

5. *See* Almond, *Settling Rule 23 Class Actions at the Precertification Stage: Is Notice Required?,* 56 N.C.L. REV. 303, 304 (1978). As Almond points out, such "strike suits," which are conjured up solely to coerce defendants into settlement negotiations, have been criticized roundly by judges and commentators, and have been described variously as "Frankenstein monsters," Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, C.J., dissenting), "legalized blackmail," Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1, 9 (1971), and "engine[s] of destruction," Simon, *Class Actions—Useful Tool or Engine of Destruction,* 55 F.R.D. 375, 375 (1972).

6. "The large fees that class actions can generate may create a conflict of interest be-

"buy off" a representative plaintiff who is willing to sell, for nuisance value, whatever interest the putative class members may have in the maintenance of the suit.[7]

There are two competing policy concerns underlying the precertification settlement process. The public policy of encouraging settlement lies at one end of the spectrum.[8] At the other end is the protection of the rights of absent class members—a consideration with apparent constitutional ramifications.[9] The procedural apparatus that governs the class action device represents an attempt to balance these competing interests.

In the federal courts, class action procedure is governed by rule 23 of the Federal Rules of Civil Procedure.[10] The federal rules contemplate certification of the class first,[11] followed by notice to members of the

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tween the attorney and the named plaintiffs and can provide an incentive to abuse the class action process by bringing suits of questionable legal merit." *Harvard Study, supra* note 1, at 1581-82; *see also* Foster v. Boise-Cascade, Inc., 420 F. Supp. 674, 686 (S.D. Tex. 1976) (expressing concern that "plaintiffs' attorney may accept an insufficient judgment for the class in trade for immediate and certain compensation for himself in the form of legal fees . . . ."), *aff'd,* 577 F.2d 335 (5th Cir. 1978).

7. *See* TRIAL LAWYERS' RECOMMENDATIONS, *supra* note 2, at 32. One practitioner has noted that "a defendant may be tempted to bribe the plaintiff, particularly where his individual claim is modest compared to the defendant's exposure." Fylstra, *Settlement of Class Action Cases Prior to Class Certification,* 69 ILL. B.J. 24, 24 (1980). It likewise has been suggested that "[t]he sheer magnitude of class action litigation and the expense and complexity of defending class claims often convince these defendants that a one-sided, undeserved cash settlement is preferable to whatever Pyrrhic victory might be won after months, if not years, of protracted litigation on the merits." Almond, *supra* note 5, at 304.

8. "[T]here is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense." Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976) (footnote omitted); Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 63 (S.D. Tex. 1977); *see also* Pearson v. Ecological Science Corp., 522 F.2d 171, 176 (5th Cir. 1975) ("[W]e are guided throughout our decision by the principle that '[s]ettlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits.' ") (quoting D. H. Overmyer Co. v. Loflin, 440 F.2d 1213, 1215 (5th Cir. 1971)), *cert. denied sub nom.* Skydell v. Ecological Science Corp., 425 U.S. 912 (1976); Stull v. Baker, 410 F. Supp. 1326, 1332 (S.D.N.Y. 1976) ("The courts, as well as the law, favor the compromise of disputed claims.").

9. *See, e.g.,* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (in order to bind absent but known class plaintiffs to judgments for money damages or similar relief, a state must provide "minimal procedural due process protection," that is, the plaintiff must receive notice reasonably calculated to succeed and an opportunity to remove himself from the class by executing and returning an "opt out" form). *See generally* Comment, Phillips Petroleum Company v. Shutts, *Procedural Due Process, and Absent Class Plaintiffs: Minimum Contacts is Out—Is Individual Notice In?,* 13 HASTINGS CONST. L.Q. 817, 830-36 (1986) (authored by Bob Wenbourne) (examining the *Schutts* "minimal procedural due process protection" standard).

10. FED. R. CIV. P. 23.

11. Federal rule 23(c)(1) provides in part that "[a]s soon as practicable after the com-

class, alerting them to the pendency of the litigation.[12] If a settlement or compromise of the action is proposed thereafter, rule 23(e) requires the court to apprise the class of the terms of the proposed settlement[13] and of the options available to the class members.[14]

The federal rules do not address specifically the situation in which the named parties in a purported class action reach a settlement agreement *prior to* the certification decision. As a result, the federal courts remain sharply divided on the applicability of the notice and court approval requirements of rule 23(e) at the precertification stage.[15]

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mencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." FED. R. CIV. P. 23(c)(1).

12. Federal rule 23(c)(2) provides:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

FED. R. CIV. P. 23(c)(2).

Of course, the notice requirements of rule 23(c)(2) are limited expressly to class actions maintained under rule 23(b)(3) that involve common questions of law and fact. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175, 177 n.14 (1974) (rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort in class actions brought under rule 23(b)(3), but declining to address whether such notice is required in actions brought under subdivisions (b)(1) and (b)(2) of rule 23); *see also* 2 H. NEWBERG, *supra* note 2, § 8.05, at 98-100 (discussing the notice implications of 23(b)(3) certification); *Manual of Class Action Notice Forms,* 1979 A.B.A. SEC. ANTITRUST at 4-11 (same) [hereinafter *Notice Forms*].

If certified as either a 23(b)(1) or 23(b)(2) class action, notification of class certification is not mandated by rule 23(c)(2), but the federal courts have split on whether due process requires some sort of notice. *See* Wetzel v. Liberty Mut. Ins., 508 F.2d 239, 256-57 (3d Cir. 1975) (due process did not require individual notice to class members in a Title VII employment discrimination class action certified pursuant to rule 23(b)(2)), *cert. denied,* 421 U.S. 1011 (1982); *accord* Larionoff v. United States, 533 F.2d 1167, 1184-87 (D.C. Cir. 1976) (23(b)(1) class action), *aff'd,* 431 U.S. 864 (1977); American Fin. Sys. v. Harlow, 65 F.R.D. 94, 110-11 (D. Md. 1974) (23(b)(2) class action); Badgett v. International Bhd. of Elec. Workers, 21 Fed. R. Serv. 2d (Callaghan) 173, 174-75 (N.D. Ohio 1975) (23(b)(2) class action). *But see* Johnson v. General Motors Corp., 598 F.2d 432, 436-37 (5th Cir. 1979) (due process requires that notice be sent to absent class members in a 23(b)(2) action before their individual monetary claims can be barred by res judicata); Burwell v. Eastern Airlines, Inc., 68 F.R.D. 495, 499 (E.D. Va. 1975) (individual notice required in 23(b)(2) class action); Kolta v. Tuck Indus., 20 Fed. R. Serv. 2d (Callaghan) 1049, 1050 (S.D.N.Y. 1975) (same).

13. *See infra* text accompanying note 26. Such notice is required regardless of whether the action has been certified under rule 23(b)(1), (b)(2), or (b)(3).

14. Generally speaking, the absent class members must be given an opportunity to object to the terms of the proposed settlement. If the settlement subsequently is approved, the objectors may be permitted to assume the role of class representatives for purposes of appealing from the final judgment approving the settlement. *Notice Forms, supra* note 12, at 11.

15. *See infra* notes 30-160 and accompanying text. One commentator has suggested that

California has no analogue to federal rule 23. A broad provision in the California Code of Civil Procedure authorizes the use of the class action device.[16] In addition, the courts may find statutory authorization in the Consumer Legal Remedies Act (Act),[17] which was promulgated in 1970. The Act allows a consumer who suffers any damage resulting from a "method, act, or practice" made unlawful by the Act to bring a class action on behalf of himself and other similarly situated consumers.[18] The procedural prerequisites to bringing a consumer class action under the Act are similar to those set forth in federal rule 23(a),[19] and the California courts, on occasion, have looked to the procedural provisions of the Act even in actions outside the consumer context.[20]

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the federal authorities can be grouped into four categories, each espousing a fundamentally different theory with regard to the applicability of rule 23(e) in the precertification setting:

> 1) rule 23(e) should be strictly applied to dismissals and settlements of uncertified class actions; 2) rule 23(e) should be applied to such settlements and dismissals but notice of the suit's termination need not be sent to all putative class members; 3) rule 23(e) is not applicable at all to dismissals and settlements of uncertified class actions; and 4) rule 23(e) should be applied according to the so-called functional approach under which a flexible case-by-case analysis is utilized.

Comment, *The Applicability of Rule 23(e) to Precertification Proceedings: The Functional Approach Applied,* 25 VILL. L. REV. 487, 488 (1980) (authored by Kevin Silverang) (footnotes omitted). *See generally* Annotation, *Notice of Proposed Dismissal or Compromise of Class Action to Absent Putative Class Members in Uncertified Class Action Under Rule 23(e) of Federal Rules of Civil Procedure,* 68 A.L.R. FED. 290 (1984 & Supp. 1988); Annotation, *Propriety of Notice of Voluntary Dismissal or Compromise of Class Action, Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure,* 52 A.L.R. FED. 457 (1981 & Supp. 1988).

16. CAL. CIV. PROC. CODE § 382 (West 1973) provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

The California provision duplicates that of New York's Field Code, adopted in 1849. *See* N. Y. CIV. PRAC. L. & R. 7B (McKinney 1963) (superseded). New York has since abandoned this approach in favor of a series of statutes modeled after FED. R. CIV. P. 23. *See* N.Y. CIV. PRAC. L. & R. 901-909 (McKinney 1976). Several states, however, retain similar provisions. *See, e.g.,* NEB. REV. STAT. § 25-319 (1985); WIS. STAT. ANN. § 803.08 (West 1977).

17. CAL. CIV. CODE §§ 1750-1784 (West 1985).

18. *See id.* §§ 1780(a), 1781(a).

19. Federal rule 23(a) provides:

> [O]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P 23(a); *cf.* CAL. CIV. CODE § 1781(b)(1)-(4)(West 1985), which sets forth the procedural prerequisites to treatment as a consumer class action.

20. *See* McGee v. Bank of Am., 60 Cal. App. 3d 442, 447, 131 Cal. Rptr. 482, 484-85 (1976) ("Once a cognizable class has been established, the criteria and procedure to be used in determining whether a class action shall be maintained are set forth in Civil Code section 1781,

When California authority is lacking, the California Supreme Court has instructed the lower courts to look to the class action procedures of federal rule 23.[21] The California courts are not bound by federal law,[22] however, and should apply rule 23 only to the extent that it is consistent with the policies underlying the state class action device.[23]

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supplemented by reference to rule 23 of the Federal Rules of Civil Procedure."); Cartt v. Superior Court, 50 Cal. App. 3d 960, 965, 124 Cal. Rptr. 376, 380 (1975) (same).

21. *See* San Jose v. Superior Court, 12 Cal. 3d 447, 453, 525 P.2d 701, 705, 115 Cal. Rptr. 797, 801 (1974) ("This court has urged trial courts to be procedurally innovative, encouraging them to incorporate procedures from outside sources in determining whether to allow the maintenance of a particular class suit. More specifically, we have directed them to rule 23 of the Federal Rules of Civil Procedure . . . ."); La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 872, 489 P.2d 1113, 1117, 97 Cal. Rptr. 849, 853 (1971) ("Although no California statute or decision governs dismissal of class actions generally, we have previously suggested that trial courts, in the absence of controlling California authority, utilize the class action procedures of the federal rules."); Vasquez v. Superior Court, 4 Cal. 3d 800, 821, 484 P.2d 964, 977, 94 Cal. Rptr. 796, 809 (1971) ("In the event of a hiatus, rule 23 of the Federal Rules of Civil Procedure prescribes procedural devices which a trial court may find useful."); *accord* Schneider v. Vennard, 183 Cal. App. 3d 1340, 1345, 228 Cal. Rptr. 800, 803 (1986), *rev. denied,* (Nov. 26, 1986); Bangert v. Narmco Materials Inc., 163 Cal. App. 3d 207, 211, 209 Cal. Rptr. 438, 440 (1984).

The California courts also have utilized the tripartite analysis of rule 23(b) to decide whether notice to class members of the pendency of the action is required. *See* Frazier v. City of Richmond, 184 Cal. App. 3d 1491, 228 Cal. Rptr. 376, 1381-84 (1986) (finding that the action should be treated as a 23(b)(2) class action, thus obviating the need for individual notice), *rev. denied,* (Oct. 16, 1986); Miller v. Woods, 148 Cal. App. 3d 862, 196 Cal. Rptr. 69 (1983) (same); Lowry v. Obledo, 111 Cal. App. 3d 14, 23, 169 Cal. Rptr. 732, 736 (1980) (same).

In addition to the established practice of looking to federal law for guidance, at least one superior court has adopted its own local rules for the conduct of class actions. *See* LOS ANGELES COUNTY SUPER. CT. CLASS ACTION MANUAL, rules 401-470 (1982) [hereinafter SUPERIOR COURT RULES]. These rules are patterned primarily after federal rule 23, and provide for court approval of settlements and dismissals, subject to the caveat that "[a] settlement will not ordinarily be approved if as a result thereof the class representative will receive some benefit not made available to the other members of the class." *Id.* rule 461; *see infra* notes 200-02 and accompanying text.

22. For instance, in Cartt v. Superior Court, 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975), the court noted that

> Rule 23, as such, does not bind California courts. While our Supreme Court has repeatedly referred to Rule 23 as a useful tool . . . it has never adopted it as a procedural strait jacket. To the contrary, trial courts ha[ve] been urged to exercise pragmatism and flexibility in dealing with class actions.

Id. at 970 n.16, 124 Cal. Rptr. at 383 n.16; (citations omitted) *accord* Southern Cal. Edison Co. v. Superior Court, 7 Cal. 3d 832, 839, 500 P.2d 621, 625, 103 Cal. Rptr. 709, 713 (1972); Cooper v. American Sav. & Loan Ass'n, 55 Cal. App. 3d 274, 283, 127 Cal. Rptr. 579, 584 (1976).

23. On occasion, the California courts have expressed differences of opinion with their brethren on the federal courts about the policies that underlie the class action device. *See, e.g., Cartt,* 50 Cal. App. 3d at 970 n.17 124 Cal. Rptr. at 383 n.17 (Presiding Judge Kaus noted that "[t]he apparent federal distaste for consumer class actions is not reflected in California."); *see also* McGhee v. Bank of Am., 60 Cal. App. 3d 442, 451, 131 Cal. Rptr. 482, 487 (1976) (alluding to the federal policy that prohibits "dual representation" of a class by attorneys who

The California courts have not articulated cogently the procedures that trial courts should employ when the captioned parties seek to settle or dismiss a proposed class action suit. Consequently, this Note addresses the extent to which a California court, presented with a precertification settlement proposal, should apply the basic procedural safeguards of court approval and notice embodied in rule 23(e).

Section I discusses the approach the federal courts have taken in addressing the precertification settlement issue. This section examines several of the early federal cases in which the courts imposed a mandatory notice requirement, even when the named parties sought to compromise only their individual claims. The section concludes that a "functional approach" to rule 23(e), in which notification of the proposed settlement is discretionary with the court, best serves the policies underlying the rule.

The Note then examines the California approach to precertification issues. Section II discusses several California cases in which the parties initiating class action lawsuits have obtained satisfaction of their individual claims prior to a judicial determination of the viability of the class.[24] This section focuses on the judiciary's perceived need to control the settlement process. In Section III, the Note sketches a proposal for California courts faced with the task of assessing the fairness of proposed settlements in nascent class action suits. Finally, the Note concludes by suggesting that, in the absence of statutory clarification, a flexible approach to precertification issues would best serve the interests of the parties, the putative class, and the California courts.

I. The Federal Approach to Precertification Settlements

The purpose of this Note is to anticipate California's treatment of the precertification settlement problem. Because the federal courts have reached widely divergent results due to subtle procedural and factual variations, the temptation to generalize California's probable treatment of the problem by engaging in judicial "head counting" must be resisted as both artificial and misleading. Most of the cases are essentially result-oriented, and are best categorized not by circuit or judicial district but according to their outcomes. Only by identifying the strengths and

also serve as class representatives, but noting that "in California such dual representation, subject to the discretionary authority of the court to prevent overreaching, has been implicitly sanctioned . . . . ").

24. Satisfaction of the named plaintiff's claim may be obtained by a consensual agreement between the parties, or may result from a defendant's unilateral grant of benefits to the named plaintiffs. The California courts have taken an especially dim view of the latter practice, preventing dismissal of the claim without notice to the class. *See* La Sala v. American Sav. & Loan Ass'n, 5 Cal.3d 864, 868, 489 P.2d 1113, 1115, 97 Cal. Rptr. 849, 851 (1971) (defendant's unilateral grant of benefits to named plaintiffs did not render them unfit to continue to represent the class).

weaknesses of the various approaches can California hope to construct a useful procedural framework and avoid the unevenness that has plagued the federal courts.

A. Rule 23(e)

The United States Supreme Court promulgated rule 23(e) in 1966.[25] In its present form, the rule provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."[26] The purpose of the rule is to curb abuse of the class action device by ensuring that nonparty class members are apprised of settlements potentially affecting their rights.[27] In particular, the rule seeks to discourage the captioned parties from colluding and selling out the interests of the class members.[28] The major concern is that these unnamed parties may have relied on the suit for vindication of their rights, and therefore may have refrained from commencing their own lawsuits.[29]

Because these same concerns are present at the precertification stage,[30] many courts have reasoned that rule 23(e) applies to purported class action lawsuits regardless of whether the class has been certified formally at the time the settlement is proposed.[31] Courts adhering to this

25. 28 U.S.C. (1966) app. at 2019 (amendment to rule 23).

26. FED. R. CIV. P. 23(e).

27. *See* 7B C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1797, at 340 (1986).

28. *See* 2 H. NEWBERG, *supra* note 2, § 11.63, at 502.

29. *See Harvard Study, supra* note 1, at 1540 ("Class members with individually recoverable claims may have relied upon informal publicity about the existence of the class suit and abstained from filing individual or class claims.").

30. "Rule 23 abuse is at its height during the pre-certification stage when defendant is literally threatened by potential class-wide liability. Because the existence of a class has not been determined, the likelihood increases that plaintiff and his counsel will unduly sacrifice the previously-asserted class interest for private gain." Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 66-67 (S.D. Tex. 1977); Renfrew, *Negotiation and Judicial Scrutiny of Settlements in Civil and Criminal Antitrust Cases,* 70 F.R.D. 495, 500-01 (1976) ("The potential for abuse is greatest when a settlement or other disposition is suggested either before discovery or before certification of the class.") (authored by Judge Renfrew of the Northern District of California).

31. *See e.g.,* Philadelphia Elec. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 326 (E.D. Pa. 1967), in which the court held that

> whatever uncertainties exist as to the precise status of an action brought as a class action, during the interim between filing and the 23(c)(1) determination by the court, it must be assumed to be a class action for purposes of dismissal or compromise under 23(e) unless and until a contrary determination is made under 23(c)(1).

For discussion of *Philadelphia Elec.,* see *infra* notes 41-48 and accompanying text.

The weight of authority would appear to favor this early presumption of class viability. *See, e.g.,* City of Inglewood v. City of Los Angeles, 451 F.2d 948, 951 (9th Cir. 1971) (holding that a purported class action must be assumed to be a class action until the court has reached a contrary determination); Kahan v. Rosensteil, 424 F.2d 161, 169 (3d Cir.) (same), *cert. denied,*

rather expansive view of rule 23(e) generally require not only that the court approve the settlement, but also that notice of the proposed settlement be sent to members of the putative class.[32] Because of the expense of complying with the notice requirement, the benefits of early settlement are diminished significantly in these jurisdictions that presume the viability of the class and require such notice prior to certification.[33]

Several courts—perhaps recognizing that class allegations often are manufactured solely to enhance the named plaintiff's bargaining leverage[34]—have taken the view that rule 23(e), by its express terms, is not applicable to precertification settlements that extinguish only the individual claims of certain class members.[35] To the extent that the court approval requirement is foreclosed by outright rejection of rule 23(e), these cases may go too far.[36]

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398 U.S. 950 (1970); *see also* Smith v. Josten's Am. Yearbook Co., 78 F.R.D. 154, 168 (D. Kan. 1978) ("[p]ending certification class status must be presumed"), *aff'd,* 624 F.2d 125 (10th Cir. 1980); Bantolina v. Aloha Motors, 75 F.R.D. 26, 30 (D. Haw. 1977) ("Where the question of notice under Rule 23(e) has been presented prior to a determination on the validity of the class action, courts have presumed the viability of the class action."); Burgener v. California Adult Auth., 407 F. Supp. 555, 560 (N.D. Cal. 1976) (after filing, and before class determination, "action must be presumed to be proper for purposes of dismissal or settlement and therefore Rule 23(e) applies"); *In re* Air West Sec. Litig., 73 F.R.D. 12, 13-14 (N.D. Cal.) (the suit should be treated as a properly constituted class action during the period between the filing of the suit and the ruling on the motion to certify), *aff'd,* 542 F.2d 1090 (9th Cir. 1976); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 483 (N.D. Ill. 1970) (same); Johnson v. Wentz Equip. Co., 18 Fair Empl. Prac. Cas. (BNA) 1499, 1501 (D. Kan. Dec. 22, 1977) (same).

32. *See infra* notes 49-77 and accompanying text.

33. Referring to the potentially onerous cost of notifying putative class members of settlements that do not purport to compromise their rights, one commentator has posited that "[a]n individual settlement at the precertification stage that must be communicated to an unknown number of unnamed potential plaintiffs is, from the defendant's perspective, worse than no settlement at all." Almond, *supra* note 5, at 314. Likewise, it has been suggested that the "notice requirement can only have the effect of inhibiting the settlement of suits." Comment, *supra* note 15, at 502.

34. [T]he major threat posed by the settlement of the named plaintiff's claim prior to class certification is that the named plaintiff and his counsel will have used the assertion of a class to increase their personal bargaining leverage and extract from the defendant a settlement which, although prompted in part by defendant's interest in foreclosing the possibility of class recovery, makes no provision for the asserted class members.

Magana, 74 F.R.D. at 71 (citations omitted); *see also Yaffe,* 50 F.R.D. at 483 (" '[N]o litigant should be permitted to enhance his own bargaining power by merely alleging that he is acting for a class of litigants.' ") (quoting *Philadelphia Elec.,* 42 F.R.D. at 328); *Harvard Study, supra* note 1, at 1540.

35. *See e.g.,* Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, 455 F.2d 770, 775 (2d Cir. 1972) (rule 23(e) "does not bar non-approved settlements with individual members [of the putative class] which have no effect upon the rights of others"); Rodgers v. United States Steel Corp., 70 F.R.D. 639, 642 (W.D. Pa.) (same), *appeal dismissed,* 541 F.2d 365 (3d Cir. 1976); Nessenoff v. Muten, 67 F.R.D. 500, 502-03 (E.D.N.Y. 1974) (same).

36. The requirement that an impartial judge scrutinize proposed settlements often provides the best protection for the putative class against collusive settlements. *See* 2 NEWBERG,

The better view—and the one that appears to be gaining currency in the federal system—strikes a balance between the deterrent function of rule 23(e) in preventing abuse of the class action device on the one hand, and the public policy of encouraging early settlement on the other. Adherents of this "functional approach" maintain that, while rule 23(e) requires *judicial approval* of settlements negotiated prior to certification, *notice* of a proposed individual settlement may be unnecessary when it would not serve the underlying aims of the rule—namely, to protect the interests of the putative class and to deter collusive settlements.[37]

Although such a reading of rule 23(e) does some violence to the plain language of the rule,[38] this more flexible approach may be particularly appealing to the California courts, which are not bound to apply mechanically the strictures of federal rule 23(e).[39]

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supra note 2, § 11.63, at 503 ("Particularly before there has been any class ruling, the court is in the position to monitor instances of potential abuse for private benefit, while encouraging settlements in the public interest.").

37. *See* Shelton v. Pargo, Inc., 582 F.2d 1298, 1314 (4th Cir. 1978) (court may approve a settlement of the named plaintiff's claim without requiring that notice be given to putative class members if "the court is clearly satisfied that there has been no abuse of the class action device and no prejudice to absent putative class members"); *In re* Fine Paper Litig., 632 F.2d 1081, 1087 (3d Cir. 1980) (citing *Shelton* with approval); Larkin Gen. Hosp. v. American Tel. & Tel. Co., 93 F.R.D. 497, 501-03 (E.D. Pa. 1982) (granting plaintiff's motion to dismiss without notice to the putative class after satisfying itself that no prejudice to the putative class would result); Jaen v. New York Tel. Co., 81 F.R.D. 696, 697-98 (S.D.N.Y. 1979) (approving settlement without notice after observing that the reliance interest of the putative class was particularly remote); Wallican v. Waterloo Community School Dist., 80 F.R.D. 492, 493-94 (N.D. Iowa 1978) (finding the "functional approach to the notice element of Rule 23 to be a sound one" and approving dismissal without notice after observing that "no danger of collusion between the parties or of a 'sell out' of the asserted class by plaintiffs appears to be present here"); Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 67 (S.D. Tex. 1977) (notice of precertification settlement to absent class members need not be given unless "facts surrounding the compromise dictate class-wide disclosure in order to prevent Rule 23 abuse or protect the interests of putative class members"); *see also* Simer v. Rios, 661 F.2d 655, 666 (7th Cir. 1981) ("the absolute notice requirement of Rule 23(e) is inapplicable to settled cases which have not been certified"), *cert. denied sub nom.* Simer v. United States, 456 U.S. 917 (1981); Gupta v. Penn Jersey Corp., 582 F. Supp. 1058, 1060 (E.D. Pa. 1984) ("notice to putative class members of pre-certification dismissal or compromise is not *mandated* by Rule 23(e)") (emphasis added); Sheinberg v. Fluor Corp., 91 F.R.D. 74, 75 (S.D.N.Y. 1981) (approving dismissal without notice when the asserted class was large and individual notice would be extremely costly).

38. On its face, rule 23(e) appears to make notice mandatory. It provides that "notice of the proposed dismissal or compromise *shall* be given to all members of the class in such manner as the court directs." FED. R. CIV. P., 23(e) (emphasis added). Adherents of the functional approach maintain that the modifying phrase—"in such manner as the court directs"—gives the court ample discretion to direct that *no* notice of a proposed settlement be given to the putative class. *See* 2 H. NEWBERG, *supra* note 2, § 11.64, at 505.

39. *See supra* note 22 and accompanying text.

B. Cases Requiring Notice and Court Approval Pursuant to Rule 23(e)

The precertification settlement problem manifested shortly after the promulgation of rule 23(e).[40] In *Philadelphia Electric Co. v. Anaconda American Brass Co.*,[41] the plaintiffs filed class actions against thirteen separate defendants alleging conspiracies to violate federal antitrust laws. Prior to certification, the named plaintiffs successfully negotiated settlement agreements with three of the thirteen defendants. These agreements contemplated the entry of final judgments barring all further claims against the settling defendants by either the named plaintiffs *or any member of the class they purported to represent.*[42]

The court first acknowledged that it was "necessary to consider whether Rule 23(e) has any application to an action which, while brought as a class action, has not yet been determined to be one."[43] Mindful of the fact that the proposed settlements sought "to compromise the claims of the class, not just the named plaintiffs,"[44] the court held, "Rule 23(e) clearly applies to this situation; indeed, due process concepts might well be held to require notice [to the putative class], even in the absence of Rule 23(e)."[45] Because the terms of the settlement would have foreclosed members of the putative class from litigating their individual claims, the court ruled that during the interim between filing and certification a purported class action "must be assumed to be a class ac-

40. In fact, the problem was recognized long before the adoption of subsection (e), which was engrafted onto federal rule 23 in 1966 as part of a comprehensive package of amendments proposed by the Advisory Committee and subsequently adopted by the Supreme Court. *See* Notes of Advisory Committee on 1966 Amendment to Rule 23, 28 U.S.C. app. at 427 (1976) [hereinafter Advisory Committee Notes].

> Prior to the 1966 amendments, federal rule 23(c), 28 U.S.C. app. (1964), had provided as follows:
>
> DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

In Hutchinson v. Fidelity Inv. Ass'n, 106 F.2d 431, 436 (4th Cir. 1939), the Fourth Circuit held that rule 23(c) was limited to the settlement of certified class actions and was not a "condition precedent to dismissal by the court" when the rights of individual litigants were implicated.

41. 42 F.R.D. 324 (E.D. Pa. 1967).

42. *Id.* at 327 (emphasis added).

43. *Id.* at 326.

44. *Id.* at 327.

45. *Id.* For a brief discussion of the due process implications of class-wide settlements, see *infra* note 75 and accompanying text.

tion for purposes of dismissal or compromise under 23(e) unless and until a contrary determination is made under 23(c)(1)."[46]

Most of the commentators, and many of the more thoughtful opinions, now recognize that the broad holding of *Philadelphia Electric* must be understood in its proper factual context.[47] There, the settlement agreement was intended to bind the entire class, not just the named parties.[48] Nevertheless, several early cases, ostensibly relying on *Philadelphia Electric,* insisted on applying a blanket notice requirement to all precertification settlements—even those in which the parties to the agreement conceded that it was without prejudice to the ostensible class.

For example, in *Yaffe v. Detroit Steel Corp.,*[49] certain stockholders of the defendant corporation brought a class action on behalf of themselves and other shareholders challenging the legality of a tender offer launched by a rival of Detroit Steel. Despite repeated remonstrations by the trial judge, the plaintiffs made no effort to certify the class.[50] Later, while the judge was on vacation, the plaintiffs sought leave to amend their complaint to delete their class allegations.[51] An interim judge granted the motion, and a settlement agreement that provided only for the named plaintiffs was consummated shortly thereafter.[52]

When the original judge returned from his vacation, he vacated the order permitting the amendment.[53] The court cited *Philadelphia Electric* for the proposition that rule 23(e) applied to precertification settlements, and, fearing that deletion of the class allegations would result in evasion of the rule, ordered that consideration of the certification issue proceed.[54]

46. *Philadelphia Electric,* 42 F.R.D. at 326. *See supra* note 31 and accompanying text.

Rule 23(c)(1) requires the district court to determine whether the asserted class is viable "[a]s soon as practicable," after the filing of the suit. Generally speaking, the class will be certified if the prerequisites of "numerosity," "commonality," "typicality," and adequacy of representation are satisfied. *See* FED. R. CIV. P. 23(a), *supra* note 19.

47. Almond, *supra* note 5, at 328; *see e.g.,* Shelton v. Pargo, Inc., 582 F.2d 1298, 1309 (4th Cir. 1978) (observing that "[i]n *Philadelphia Electric* . . . the parties were seeking to make a settlement of a class action . . . and to make that settlement binding on absent members of that assumed class," but suggesting that "where there is no binding effect of the settlement on absent potential class members" the necessity of court approval and notice is committed to the discretion of the trial judge); Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative,* 1974 DUKE L.J. 573, 595 (authored by John W. Welch) (noting that "considerations of due process required notice to be given to members of the class" in *Philadelphia Electric* "because they would be bound by the consequences of the settlement," but reasoning that these same considerations "are absent where the dismissal of the action would not foreclose the class from seeking further relief").

48. *See supra* note 42 and accompanying text.

49. 50 F.R.D. 481, 482 (N.D. Ill. 1970).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 483.

54. *Id.*

The judge opined that granting the amendment without notice to the putative class members "could result in an unwitting forfeiture of their rights."[55]

Because the lawsuit had received publicity in the financial press, the court expressed concern that "some class members, choosing to rely on this lawsuit as their means of redress, [may] have decided not to file separate actions."[56] Additionally, the opinion characterized the plaintiffs' attempts to abandon the putative class as "an impermissible abuse of the class action device. . . . [since] the defendants might well be willing to pay the named plaintiffs a premium for the elimination of the class, a premium to which they are, of course, not entitled."[57]

The settlement agreement, however, did not purport to "eliminate" the class.[58] Presumably, the absent class members in *Yaffe* would not have been prejudiced materially by the settlement with the named plaintiffs because their claims would not have been barred by principles of res judicata.[59] The best explanation for the result in this case may be that the court believed that disallowance of the settlement, coupled with the imposition of a burdensome notice requirement, would deter further abuse of the class action device—in short, notice was exacted as a sanction for misusing the device and for playing "fast and loose" with the court. It seems highly unlikely, however, that the drafters of rule 23(e) ever seriously contemplated such a punitive application of the rule.[60] Rather, the generally accepted function of the rule is to prevent abuse of the class action device in derogation of the rights of the putative class[61]—a situation arguably not confronted by the *Yaffe* court.

Similarly, in *Rothman v. Gould,*[62] the plaintiff brought suit on behalf of himself and a purported class of defrauded investors, claiming violations of the federal securities laws. Two years later, the issue of class

55. *Id.*

56. *Id.*

57. *Id.*

58. *See supra* note 52 and accompanying text.

59. Absent putative class members will not be bound by the terms of a settlement agreement unless the class is certified in connection with the settlement. *See supra* note 2; *see also* Simer v. Rios, 661 F.2d 655, 664 (7th Cir. 1981) ("a settlement entered without class certification . . . will not have a res judicata effect on the claims of absent class members").

60. The Advisory Committee Notes provide few insights into the motivations of the drafters of rule 23(e). They simply state that "[s]ubdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action." Advisory Committee Notes, *supra* note 40, at 431.

61. *See, e.g.,* Nesenoff v. Muten, 67 F.R.D. 500, 502 (E.D.N.Y. 1974) ("Rule 23(e) . . . is designed to guard against the possibility of a self-appointed class representative unilaterally settling or compromising his claim in derogation of the rights of the class as a whole."); 2 H. NEWBERG, *supra* note 2, § 11.63, at 502 ("A major purpose of Rule 23(e) is to discourage the use of the class action device to secure an unjust private settlement for the named plaintiff to the detriment of the remainder of the putative class.").

62. 52 F.R.D. 494, 495 (S.D.N.Y. 1971).

certification still remained unresolved. The plaintiff, seeking to remove the final barrier to settlement, moved to excise the class allegations from his complaint, conceding that they had been "no more than an afterthought."[63] The court would have no part of it:

> The very bringing of a class action . . . may deter the institution of suits by members of the ostensible class. The passage of time may impair or defeat the rights of others thus deflected from acting for themselves . . . .
>
> In a word, having nominated themselves as class representatives, both plaintiff and his counsel have undertaken responsibilities, and triggered possible consequences that may not now be erased by routine acceptance of the resignation they now tender.[64]

The *Yaffe* and *Rothman* courts were preoccupied with the possibility of detrimental reliance by the putative class. The reliance interest that the courts have sought to protect implicates two basic concerns. The first concern—that the passage of time might defeat the claims of potential class members who relied upon the filing of the class suit and therefore abstained from seeking legal redress—is now largely of historical interest. The United States Supreme Court resolved this concern in *American Pipe & Construction Co. v. Utah,*[65] when it held that the filing of a timely class action tolls the statute of limitations for all members of the putative class until a final determination is made regarding the propriety of class certification. Of course, *Rothman* and *Yaffe* scarcely can be criticized on this basis since those cases antedate *American Pipe* by three and four years, respectively.

Second, the courts have expressed concern that, although the statute of limitations is tolled when a class action is filed, it begins to run anew if the case is dismissed.[66] Thus, potential class members who learned through informal publicity or other means that a suit had been com-

63. *Id.*

64. *Id.* at 496. The parties' attempts at amicable resolution of their dispute triggered serious consequences indeed. The defendants, faced with the onerous task of providing "some decent notice" to the putative class, simply withdrew their settlement offer. *Id.* at 496. In addition, the plaintiff's candid admission about the insertion of the class allegations in his complaint later proved to be a double-edged sword. When the plaintiff sought to have the class certified after it became clear that the settlement was beyond repair, the defendants embraced the plaintiff's earlier position that the action was inappropriate for class treatment. *Id.* at 498. The court, unable to agree fully with either side, ordered that notice of the proposed settlement, and the antics leading up to it, be published in the *New York Times* and the *Wall Street Journal. Id.* Significantly, the defendants were assessed the costs of publishing the required notice. *Id.*

65. 414 U.S. 538, 553-54, *reh'g denied,* 415 U.S. 952 (1974). This is commonly referred to as the federal "tolling doctrine."

66. *See* United Airlines, Inc. v. McDonald, 432 U.S. 385, 391-92 (1977) (implying that the original statute of limitations begins to run anew upon denial of certification); *see generally* Wheeler, *Predismissal Notice and Statutes of Limitations in Federal Class Actions After* American Pipe and Construction Co. v. Utah, 48 S. CAL. L. REV. 771, 781-82 (1975).

menced, but not that it had been terminated, nevertheless might lose their claims to the running of the statute.[67] This second concern, though legitimate, does not justify the result in *Rothman*. There, the plaintiff had intimated that the class allegations in his complaint were little more than a ruse designed to enhance his personal bargaining power.[68] Additionally, there was no evidence that the suit had received any publicity whatsoever, nor were there any facts from which the court could conclude that there was such a class and that its members were actually and justifiably relying on the named plaintiff to advocate their cause. The remote possibility of detrimental reliance by the putative class, did not justify saddling the *Rothman* defendants with the costs of notifying a "class" that may have existed only in the plaintiff's concededly unfounded complaint.[69] On the other hand, the *Yaffe* court's decision to notify the putative class is, perhaps, more defensible in light of the publicity that suit received.[70]

In *Rotzenburg v. Neenah Joint School District,*[71] and *Duncan v. Goodyear Tire and Rubber Co.,*[72] a Wisconsin district court similarly ordered that notice of proposed precertification settlements be given to members of the putative classes. As in *Rothman* and *Yaffe,* these settlements sought to compromise only the claims of the named plaintiffs and were without prejudice to the alleged classes.[73] But unlike those cases, *Rotzenburg* and *Duncan* were decided *after* the Supreme Court's announcement of the "tolling doctrine" in *American Pipe.*[74] Consequently, the court could not, and did not, claim that notice was necessary in order to protect putative class members from the running of the statute of limitations. More puzzling, however, was the court's failure to address the reliance interest of the putative class or to advance any considered rationale for its imposition of notice.

While these opinions demonstrate a commendable solicitude for the rights of absent class plaintiffs, they blur the distinction between settlements that inure strictly to the benefit of the named parties, and those that seek to compromise the claims of the class as a whole. In the latter

67. *See Harvard Study, supra* note 1, at 1541.

68. *See supra* note 63 and accompanying text.

69. "Until a class is actually defined, any interest or expectation by an alleged member in a recovery . . . must be classified as speculative." Almond, *supra* note 5, at 331.

70. *See supra* text accompanying note 56. In *Yaffe* certain press releases concerning the lawsuit had found their way into the *Wall Street Journal.* Additionally, plaintiffs' counsel had participated in drawing up proxy materials sent to Detroit Steel shareholders that alluded to the pending class action suit. Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 483 (N.D. Ill. 1970).

71. 64 F.R.D. 181, 182 (E.D. Wis. 1974) (Gordon, J.).

72. 66 F.R.D. 615, 616 (E.D. Wis. 1975) (Gordon, J.).

73. *Duncan,* 66 F.R.D. at 616; *Rotzenburg,* 64 F.R.D. at 182.

74. 414 U.S. 538 (1974); *see supra* note 65 and accompanying text. *American Pipe* was decided on January 16, 1974. The *Rotzenburg* decision was entered on September 12, 1974; *Duncan* was decided on March 28, 1975.

situation, federal constitutional due process considerations compel the giving of notice to the potential class.[75] But when the settlement seeks only to bind individual class members, a blanket notice requirement may not only result in the abandonment of a reasonable settlement offer, but also may materially prejudice defendants (who often are taxed with notice costs), and contribute needlessly to the congestion of the nation's court system by fomenting spurious litigation.[76] Indeed, such a requirement is often tantamount to the solicitation of clients for plaintiffs' counsel under the tacit approval of the court.[77]

C. Cases Dispensing With Notice and Court Approval

A number of federal courts have devised methods of circumventing the stringent notice and court approval requirements of rule 23(e) at the precertification stage. One line of cases simply denies the applicability of the rule prior to the certification decision, except in cases in which the settling parties have sought affirmatively to prejudice the rights of alleged

75. *See* Greenfield v. Villager Indus., 483 F.2d 824, 831 (3d Cir. 1973) (when the substantive rights of absentee class members are at stake, constitutional standards of due process compel notice to those members); Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 69 (S.D. Tex. 1977) (same).

76. *See* Elias v. National Car Rental Sys. Inc., 59 F.R.D. 276, 277 (D. Minn. 1973) (suggesting that mandatory notice is equal to "soliciting a client for plaintiff's counsel under the aegis of the court. This would be improper."). One commentator has been vociferous in his criticism of the notice requirement in uncertified class actions, particularly as it relates to actions brought under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000(e)1-17. He suggests that,

> [t]his notice, a legal document bearing the imprimatur of a United States district court judge, might best be described . . . as an "invitation to sue letter." The disclosure of a cash settlement will likely prove an irresistible temptation for many and serve only to solicit new party plaintiffs for a lawsuit now abandoned by its original champions. The lesson to be learned by recipients of the notice is that they should sue the named defendant and that, regardless of the merits of the claim, the defendant will probably pay a considerable sum to settle out of court.

Almond, *supra* note 5, at 313-14.

77. The hypothetical scenario posited by Almond is helpful in illustrating this point:

> P1 sues D, claiming to represent a class of 100 potential plaintiffs. P1 settles his individual claim against D, but the court requires precertification notice to the remaining 99 "class members." Sensing a windfall, P2 (one of the 99) then sues D for himself "and others similarly situated." As expected, P2 settles with D prior to class certification. Will D be required to send out a *second* notice to the remaining 98? And if P3, P4 and P5 settle their individual claims respectively, must D repeatedly notify the dwindling members of a "class" which has never been called upon to prove its viability under rule 23? By the time P50 has received 49 legal settlement notices signed by a federal district judge, can it reasonably be expected that P50 will not have gotten the message—that he will not, in turn, file his own "class action"? Add the fact that this succession of individual "class actions" tolls the statute of limitations on all outstanding potential claims, thus extending D's risk exposure far beyond the anticipated time limits of the appropriate statute of limitations.

Almond, *supra* note 5, at 314 n.63.

class members.[78] Courts adopting this view generally attribute little, if any, significance to the potential "reliance interest" of putative class members.

A few courts have opted for an even more novel approach. These courts make a threshold determination as to the propriety of class treatment.[79] If the court is unpersuaded that the class is viable, the court's function is ended and notice is unnecessary.

(1) Rule 23(e) Does Not Apply

One group of cases has rejected the broad language of *Philadelphia Electric,*[80] and has held simply that rule 23(e) is inapplicable on its face to precertification settlements with individual class members. Most of these cases rely on dicta in *Weight Watchers of Philadelphia v. Weight Watchers International.*[81] In *Weight Watchers,* the plaintiff-franchisee filed a class action complaint containing various price-fixing allegations against a franchisor of weight reduction clinics. Before the class was certified, a dispute arose concerning the defendant's right to communicate settlement overtures to the franchisees who constituted the alleged class.[82] The issue on appeal was whether the court possessed the requisite jurisdiction to review a district court order that permitted the defendant to negotiate these individual settlements with its franchisees.[83] The court noted in passing that rule 23(e), "requiring court approval of the dismissal or compromise of a class action, does not bar non-approved settlements with individual members which have no effect upon the rights of others."[84] Earlier in the opinion, Judge Friendly remarked that "it is only the settlement of the class action itself without court approval that [rule] 23(e) prohibits."[85]

Several lower federal courts were quick to seize on Judge Friendly's comments in *Weight Watchers.* For example, in *Nesenoff v. Muten,*[86] a New York district court reasoned that precertification settlement of individual class members' claims did not implicate rule 23(e): "Rule 23(e) . . . is designed to guard against the possibility of a self-appointed class representative unilaterally settling or compromising his claim in derogation of the rights of the class as a whole. . . . Here, no such problem exists."[87]

78. *See infra* notes 80-114 and accompanying text.
79. *See infra* notes 123-34 and accompanying text.
80. 42 F.R.D. 324 (E.D. Pa. 1967); *see supra* note 46 and accompanying text.
81. 455 F.2d 770 (2d Cir. 1972) (Friendly, C.J.).
82. *Id.* at 772.
83. *Id.* at 771.
84. *Id.* at 775.
85. *Id.* at 773.
86. 67 F.R.D. 500 (E.D.N.Y. 1974).
87. *Id.* at 502-03.

In *Nesenoff,* holders of common stock in Digiac Corporation commenced a class action against the corporation's board of directors. The plaintiffs claimed, *inter alia,* that the board's approval of a merger violated state and federal securities laws.[88] Thereafter, a boardmember offered to purchase the stock of certain alleged class members, apparently in an effort to reduce the size of the class and thereby defeat the "numerosity" requirement.[89] The *Nesenoff* plaintiffs contended that the defendant's offer constituted a further violation of the federal securities laws since he had failed to disclose that the real reason for the stock purchases was to invalidate the fledgling lawsuit.[90] Additionally, the plaintiffs maintained that the offer violated rule 23(e) since the stock purchases were negotiated without prior court approval.[91]

The court disagreed. Citing Judge Friendly's comments in *Weight Watchers,* the court concluded that

> such settlements do not affect the rights of the other potential class members. The plaintiffs' class action complaint has not been disturbed, nor have the other potential class members been prohibited from intervening in the instant suit or commencing their own suit in the event that the plaintiffs' class action motion is denied.[92]

Having determined that rule 23(e) was inapplicable to individual settlements negotiated at the precertification stage, the court concluded that it lacked authority to undertake even a supervisory role in connection with the contemplated stock purchases.[93]

Likewise, in *Rodgers v. United States Steel Corp.,*[94] certain minority employees of the defendant corporation brought a class action against their employer and various labor unions alleging racially discriminatory practices in the steel industry. Thereafter, the defendant tendered back pay to certain potential class members in exchange for a waiver of their rights to damages under the class action.[95] The named plaintiffs sought to enjoin the individual settlements, which they argued were in contravention of rule 23(e).[96]

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88. *Id.* at 501.

89. The "numerosity" requirement, a prerequisite to class action treatment under rule 23, ensures that the class is so numerous that joinder of all the parties under the conventional joinder provisions of the federal rules is not feasible. *See* FED. R. CIV. P. 23(a)(1), *supra* note 19.

90. *Nesenoff,* 67 F.R.D. at 502.

91. *Id.* The plaintiffs apparently argued that each stock purchase was, in effect, a "compromise" within the meaning of rule 23(e) and so implicated the court approval requirements of the rule. *Id.*

92. *Id.* at 503 (footnote omitted).

93. *Id.* at 503 n.4.

94. 70 F.R.D. 639, 640 (W.D. Pa.), *appeal dismissed,* 541 F.2d 365 (3d Cir. 1976).

95. *Id.* at 640-41.

96. *Id.* at 642.

The court refused to enjoin the settlements. Citing *Weight Watchers,* the court ruled that the named plaintiffs' reliance upon rule 23(e) was misplaced:

> By its terms, Rule 23(e) applies and is limited to the dismissal or compromise of a class action itself, where application of its strictures is necessary to protect the rights of absentee or nonparty class members who may be bound or affected by a settlement of their claims by their class representatives. In contrast, the Rule does not attach to direct settlements with *individual* class members which have no effect upon the rights of others.[97]

As *Nesenoff* and *Rodgers* illustrate, courts declining to apply rule 23(e) at the precertification stage generally have been confronted with attempts by defendants to settle the individual claims of potential class members *other than the named representatives.*[98] When the potential class is large, the aggregate effect of such settlements is likely to be negligible, because the representative plaintiffs can simply certify a class consisting of the remaining, nonsettling absentees. If, however, the defendant ultimately succeeds in settling with a substantial percentage of the alleged class, the numerosity requirement, a prerequisite to class certification, may be defeated. In such cases, it hardly can be said that the individual settlements "have no effect upon the rights of others."[99]

The Second Circuit recently reviewed the *Weight Watchers* dicta in a slightly different context. *Christensen v. Kiewit-Murdock Investment Corp.*[100] involved the merger of The Continental Group (Continental) into a subsidiary of Kiewit-Murdock Investment Corporation (Kiewit). Under the terms of the merger, Continental's common stock was "cashed-out,"[101] while holders of Continental preferred stock received newly issued shares in the Kiewit subsidiary.[102] After the merger, certain stockholders who had received preferred shares in the surviving corporation brought a class action in a federal district court on behalf of all former holders of Continental preferred stock that had been exchanged pursuant to the merger. They alleged that the merger had rendered the new corporation virtually insolvent and had left them with "speculative

97. *Id.* (footnotes omitted) (citations omitted) (emphasis in original).

98. *See e.g.,* American Fin. Sys. v. Harlow, 65 F.R.D. 572, 575 (D. Md. 1974) (rule 23(e) did not prohibit trustee of profit sharing retirement trust from notifying nonparty trust beneficiaries in title VII sex discrimination class action of its willingness to enter into individual settlements with members of the uncertified class).

99. Weight Watchers of Philadelphia v. Weight Watchers International, 455 F.2d 770, 775 (2d Cir. 1972); *Rodgers,* 70 F.R.D. at 642.

100. 815 F.2d 206 (2d Cir.), *cert. denied,* 108 S. Ct. 250 (1987).

101. In a "cash-out merger," the acquiring corporation pays cash to the shareholders of the corporation it wishes to acquire (in this case, holders of Continental's common stock) rather than issuing stock in the surviving corporate entity. *See generally* 1 M. LIPTON & E. STEINBERGER, TAKEOVERS & FREEZEOUTS § 1.03[3][a] (rev. ed. 1988).

102. *Christensen,* 815 F.2d at 207-08 (Feinberg, J., dissenting).

low grade, highly leveraged securities" rather than cash.[103] Among other things, the plaintiffs sought an order compelling Kiewit to redeem their preferred shares.[104]

Prior to certification of the class, Kiewit announced a tender offer for all of the outstanding preferred shares.[105] The plaintiffs thereafter moved to dismiss the action as moot since the tender offer provided the entire class with relief "substantially equivalent" to that sought in the complaint.[106] In addition, however, the plaintiffs sought an award of attorneys' fees and costs on the ground that Kiewit's tender offer constituted a "flagrant avoidance" of rule 23(e).[107] The district court dismissed the action, but denied the plaintiffs' application for fees and costs.[108] The court of appeals, over a vigorous dissent, affirmed.[109]

Writing for the majority, Judge Timbers remarked that the plaintiffs "did not violate Rule 23(e); nor did they 'flagrantly', or even 'brazenly', ignore it."[110] Rather,

> *Weight Watchers* establishe[d] that, at least prior to class certification, defendants do not violate Rule 23(e) by negotiating settlements with potential members of a class. In the instant case, therefore, even if the tender offer were deemed to have been a settlement or "compromise," Kiewit Corp. neither violated nor ignored Rule 23(e). There is simply no basis for concluding that any of the [defendants] acted in bad faith, justifying an award of attorneys' fees and costs.[111]

In his dissent, Judge Feinberg first noted "that the spirit and policies behind Rule 23 may apply in the pre-certification stage of a class suit . . . ."[112] He then chastened the majority for its myopic application of the *Weight Watchers* dictum and distinguished the defendants' conduct from that of the defendants in *Weight Watchers*. Unlike the defendants in *Weight Watchers*, "through the public tender offer [the] defendants [in this case] extended an offer to the entire putative class—an offer that effectively settled the case by mooting the entire action. This is precisely the activity that Rule 23(e) was designed to control through judicial review and supervision."[113] The dissent concluded that the defendants' ac-

103. *Id.* at 208-09, 216.
104. *Id.* at 209.
105. *Id.*
106. *Id.* at 208, 210.
107. *Id.* The plaintiffs claimed, *inter alia*, that the American rule, which generally precludes litigants from recovering attorneys' fees, is inapplicable when the losing party has acted in "bad faith." Because the Kiewit tender offer was launched allegedly in "flagrant avoidance" of rule 23(e), the plaintiffs felt themselves entitled to an award of fees and costs under this so-called "bad faith" exception to the rule. *Id.* at 212.
108. *Id.* at 208.
109. *Id.*
110. *Id.* at 213 (Timbers, J.).
111. *Id.*
112. *Id.* at 217 (Feinberg, J., dissenting).
113. *Id.* at 217-18 (footnote omitted).

tions had violated rule 23(e) by circumventing the remedial procedures of the rule, thus entitling the plaintiffs to an award of attorneys' fees.[114]

Weight Watchers and its progeny are not alone in finding that rule 23(e) does not apply to precertification settlements. Although the United States Supreme Court has never confronted directly the applicability of rule 23(e) at the precertification stage,[115] one commentator has argued that dictum in *Sosna v. Iowa*[116] forecloses the application of rule 23(e) prior to certification.[117] Justice Rehnquist, writing for the *Sosna* Court, remarked in a footnote that "*[o]nce [a] suit is certified as a class action,* it may not be settled or dismissed without the approval of the court."[118] Professor Wheeler suggests that "[t]he clear implication of the italicized statement is that the requirement of court approval for settlement or dismissal embodied in rule 23(e) does not apply *until* an action has been certified as a class action."[119]

Professor Wheeler's interpretation of the *Sosna* dictum has received mixed reviews in the lower courts.[120] Nevertheless, it seems unlikely that the Court attributes the same significance to the dictum as Professor Wheeler since the Court has repeated the celebrated language in *Sosna*

114. *Id.* at 218.

115. In Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, *reh'g denied,* 446 U.S. 947 (1980), the Court acknowledged that "[d]ifficult questions arise as to what, if any, are the named plaintiffs' responsibilities to the putative class *prior* to certification." *Id.* at 340 n.12 (emphasis in original). Regrettably, the Court concluded that "this case does not require us to reach these questions." *Id.*

Deposit Guaranty is discussed *infra* at notes 121, 180, 184.

116. 419 U.S. 393 (1975).

117. *See* Wheeler, *supra* note 66, at 775 n.16a.

118. *Sosna,* 419 U.S. at 399 n.8, *quoted in* Wheeler, *supra* note 66, at 775 (emphasis added by Wheeler).

119. Wheeler, *supra* note 66, at 775 n.16a (emphasis added).

120. For example, in Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 66 (S.D. Tex. 1977), the court refused to "accept the negative implication urged by counsel that, in view of the . . . language [of *Sosna*], Rule 23(e) and its requirement of notice should not be presumed to apply prior to class certification." For a discussion of *Magana,* see *infra* notes 135-148 and accompanying text.

Likewise, in Duncan v. Goodyear Tire and Rubber Co., 66 F.R.D. 615 (E.D. Wis. 1975), the court suggested that

> the Supreme Court's observation [in *Sosna*] that notice is required after certification intimates no view on the more difficult question presented by this case: Is notice of a compromise also required *before* a class action certification? I remain convinced that notice to the alleged class members is mandated by Rule 23(e).

Id. at 616. *But see* Shelton v. Pargo, Inc., 582 F.2d 1298, 1304 (4th Cir. 1978) ("We are convinced . . . that Professor Wheeler is more accurate in his reading of *Sosna,* particularly in light of later cases pointing clearly in the same direction, that 23(e) applies only to the dismissal of the class action."). For a discussion of *Shelton,* see *infra* notes 149-59 and accompanying text.

while acknowledging "that Rule 23(e) prescribes certain responsibilities of a district court in a case *brought* as a class action . . . ."[121]

The inability of the Second Circuit to reach a consensus in *Christensen*[122] as to the applicability of rule 23(e), and the controversy surrounding the *Sosna* dictum, are symptomatic of the precertification settlement problem—it does not lend itself to nice distinctions or easy solutions. Some federal courts, however, have opted for a seemingly more enlightened approach to the problem.

(2) Expedited Ruling on Motion to Certify

A number of courts, while conceding that rule 23(e) arguably does apply in the precertification setting, have attributed much significance to language in *Philadelphia Electric* that an action filed as a class action must be treated as such for purposes of compromise or dismissal "*unless and until* a contrary determination is made under 23(c)(1)."[123] These cases avoid the rigid and potentially wasteful notice requirements of rule 23(e) by requiring an expedited preliminary ruling on the certification issue. If the court determines that the action is unworthy of class action status, then notice becomes unnecessary.

Pearson v. Ecological Science Corp.[124] is illustrative of this approach. In *Pearson,* two of the ninety-nine original and intervening plaintiffs in sixteen consolidated securities fraud actions sought to overturn a settlement that had been approved by the district court.[125] They argued that

121. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332 n.5 (1980) (emphasis added). In *Deposit Guaranty,* the Court held that the defendant's unsolicited payment to the named plaintiffs of the amounts sought in their complaint did not render their cause of action moot. *Id.* Using language highly reminiscent of *Sosna,* the Court observed that

> Rule 23(e) prescribes certain responsibilities of a district court in a case brought as a class action: once a class is certified, a class action may not be 'dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.' Conceivably, there also may be circumstances, which need not be defined here, where the district court has a responsibility, prior to approval of a settlement and its dismissal of the class action, to provide an opportunity for intervention by a member of the putative class for the purpose of appealing the denial of class certification.

Id.

See *infra* notes 180, 184 for a discussion of *Deposit Guaranty* in connection with California's treatment of the mootness problem.

122. *See supra* notes 100-114 and accompanying text.

123. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 326 (E.D. Pa. 1967) (emphasis added); *see supra* notes 31, 46 and accompanying text.

FED. R. CIV. P. 23(c)(1) provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained . . . ."

124. 522 F.2d 171 (5th Cir. 1975), *cert. denied sub nom.* Skydell v. Ecological Science Corp., 425 U.S. 912 (1976).

125. *Id.* at 172.

"the settlement was void as a matter of law as constituting a sale of class rights by the named plaintiffs."[126] Before entering the parties' stipulations of settlement, the district court concluded that the action was inappropriate for class action treatment.[127] Thereafter, the settlements were approved and the action was dismissed without notice to the putative class and with prejudice only to the settling parties.[128]

The appellate court unanimously affirmed, holding that when a "court has ruled under Rule 23(c)(1) that an action cannot properly be maintained as a class action the notice requirements of Rule 23(e) do not apply, at least where the dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court."[129]

The court of appeals also took a pragmatic view of the problem of detrimental reliance by members of the putative class:

> We fail to understand how individuals could have relied on the possibility that some day a court might determine that the suit was proper for class action determination . . . . [S]ince no Rule 23(c)(3) notice of the maintenance of this litigation was ever given to nonparty members of the originally alleged class, reliance by those individuals on this action to recover their losses would be particularly misplaced.[130]

There is a certain seductiveness to this rationale, and the same reasoning would apply to the vast majority of precertification settlement cases since notice of the pendency of the litigation rarely, if ever, is given prior to the 23(c)(1) certification decision. But this approach ignores the concerns expressed by the district courts in *Yaffe*[131] and *Rothman*.[132] In those cases, the *perceived* danger that plaintiffs might have relied upon the captioned parties to vindicate their rights was found to justify the imposition of a broad notice requirement.[133] Nevertheless, the expedited certification approach has generated a modest following in the lower courts,[134] and may be appropriate in cases in which the "reliance inter-

126. *Id.* at 176.
127. *Id.* at 173.
128. *Id.* at 174-75.
129. *Id.* at 177 (citations omitted).
130. *Id.* at 178.
131. 50 F.R.D. 481 (N.D. Ill. 1970). *See supra* notes 49-61 and accompanying text.
132. 52 F.R.D. 494 (S.D.N.Y. 1971). *See supra* notes 62-69 and accompanying text.
133. *See* Rothman v. Gould, 52 F.R.D. 494, 496 (S.D.N.Y. 1971) ("The very bringing of a class action, especially where counsel are known to be skilled in the field, may deter the institution of suits by members of the ostensible class."); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 483 (N.D. Ill. 1970) (observing that, because the lawsuit had received publicity in the financial press, "[i]t is altogether possible . . . that some class members, choosing to rely on this lawsuit as their means of redress, have decided not to file separate actions").
134. *See, e.g,* Held v. Missouri Pac. R.R., 64 F.R.D. 346, 351 (S.D. Tex. 1974) (approving a settlement agreement between the named parties without notice to the putative class after determining that the action did not warrant class treatment because the named plaintiff was an inadequate representative of the alleged class); Muntz v. Ohio Screw Prod. 61 F.R.D. 396, 398-

est" of the putative class members seems particularly remote—for example, when the suit has received little, if any, publicity.

D. The "Functional Approach" to Rule 23(e)

An increasing number of courts have refrained from literal application of rule 23(e) in the precertification context. These cases are well reasoned and provide a cogent analytical model for California courts confronted with precertification settlement proposals.

Magana v. Platzer Shipyard, Inc.[135] was one of the first cases to endorse expressly the so-called "functional approach." In *Magana,* the plaintiff brought a class action suit against his employer on behalf of all "Black and Spanish surnamed American persons" denied employment by the defendant.[136] The suit alleged discrimination on the basis of race and national origin in violation of Title VII of the Civil Rights Act of 1964.[137] Six months later, plaintiff's counsel had expended no significant effort in ascertaining whether such a class actually existed.[138] Thereafter, attorneys for the plaintiff and defendant submitted a settlement agreement to the court for approval. The agreement provided for payment of $3,000 to the plaintiff in satisfaction of his individual claim and made no provision for the alleged class members.[139]

The court first observed that rule 23(e) generally applied to precertification settlements of class actions.[140] The determination that the rule

99 (N.D. Ohio 1973) (acknowledging that potential class members may rely on the named plaintiffs to prosecute their claims, but refusing to require "the vain act of giving settlement notice to an invalid class" after denying class certification for failure to satisfy the numerosity requirement); Elias v. National Car Rental Sys., Inc., 59 F.R.D. 276, 277 (D. Minn. 1973) (concluding that named plaintiff's desire to withdraw his representation of the class rendered him an inadequate class representative, thereby foreclosing the maintenance of a class action and making notice unnecessary); Berger v. Purolator Prods., Inc., 41 F.R.D. 542, 545 (S.D.N.Y. 1966) (holding that the class action device was not superior to other available methods of adjudication and approval by the court of a proposed compromise therefore was not required).

135. 74 F.R.D. 61 (S.D. Tex. 1977).

136. *Id.* at 63.

137. 42 U.S.C. §§ 2000e to 2000e-17 (1974).

138. *Magana,* 74 F.R.D. at 64.

139. *Id.*

140. *Id.* at 63. The court reasoned that

> because of the public interest in class litigation created by the allegation of classwide injury, and the concern that the public interest has not been sacrificed for private gain during settlement negotiations, the Court must fulfill the review and approval duties imposed by Rule 23(e) before authorizing the entry of a joint stipulation of dismissal.

Id. The court also emphasized that the federal courts have "recognized almost unanimously that the allegation of a class in the complaint invokes the judicial duties imposed by Rule 23(e) until such time as the Court determines that a class action is not proper." *Magana,* 74 F.R.D. at 65 (citing, *inter alia,* Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967)).

applied, however, was not dispositive of the matter. Instead, after recognizing that the court approval mandate of rule 23(e) was obligatory in all cases prior to dismissal or compromise of the action,[141] the court concluded that the notice requirement should be imposed only when necessary to vindicate the reliance interest of the class or prevent the mischief that the rule was designed to combat.[142]

According to the court, the notice and court approval requirements embodied in rule 23(e) further two basic aims: "(1) *protection* of the interests of putative class members by the Court; and (2) *prevention* of Rule 23 abuse characterized by collusion between the private parties to the settlement, including counsel."[143] In light of these aims, the court held

141. *Magana,* 74 F.R.D. at 66.

142. *Id.* at 67.

143. *Id.* at 66 (emphasis in original). Further, the court was inclined "to place greater emphasis on the 'prevention of abuse' " because

> potential class members have a more speculative interest in the litigation than certified class members and . . . their expectations therefore should be accorded less weight. Thus, the "protection of class" function embodied in Rule 23(e), although important, is not paramount in the pre-certification stage, as it is once a class actually is defined.

Id. at 66-67.

One commentator has been highly critical of courts that rely principally on the "prevention of abuse" rationale. *See* Almond, *supra* note 5, at 318, 325. He posits that "it is by definition impossible for rule 23(e) notice to *deter* abuse that has already occurred in a pending case, or to undo abuse that has already been done." *Id.* at 325 (emphasis in original).

Almond argues that "[b]oth abuse and reliance are engendered by the ability of named plaintiffs and defendants to communicate with the purported class or to publicize the pending action prior to a ruling on class certification." *Id.* at 338. He therefore concludes that "court supervision and monitoring of communication and publicity effectively can eliminate any justifiable reliance upon the pending action by absentee 'class' members." *Id.* at 340.

Even if judicially imposed restrictions on communications with the putative class were deemed a desirable policy, this approach arguably is foreclosed by Gulf Oil Co. v. Bernard, 452 U.S. 89, 94-95 (1981), in which the United States Supreme Court concluded that a federal district court had exceeded its authority in imposing "a complete ban on all communications concerning the class action between parties or their counsel and any actual or potential class member who was not a formal party, without the prior approval of the court." The Court remarked,

> [T]o the extent that the district court is empowered . . . to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened. Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties.

Id. at 102 (quoting Coles v. Marsh, 560 F.2d 186, 189 (3d Cir. 1977)).

Significantly, precertification communications have been expressly upheld in California. *See, e.g.,* Atari, Inc. v. Superior Court, 166 Cal. App. 3d 867, 874, 212 Cal. Rptr. 773, 777 (1985) (holding that the trial court's approval of precertification notice by the named plaintiffs to putative class members was proper, but finding that the trial court abused its discretion in simultaneously restricting the defendant's access to the same individuals). The *Atari* court did

that notice of a precertification settlement to absent class members was not compelled as a matter of law in every case, but should depend upon "whether or not the disclosed facts surrounding the compromise dictate class-wide disclosure in order to prevent Rule 23 abuse or protect the interests of putative class members."[144]

In concluding that the notice requirement should be imposed on an ad hoc basis, the *Magana* court disregarded ten years of precedent. Although Judge Bue, who wrote the opinion, de-emphasized the novelty of the approach,[145] he acknowledged that "in every reported decision located by this Court which discusses the propriety of class notice prior to approval of an individual settlement, the courts unanimously have concluded that notice is necessary."[146] Thus, not surprisingly, the court appeared to favor notification of the putative class.[147] Significantly, however, the opinion left open the possibility that, in an appropriate case, notice might not be required.[148]

Shelton v. Pargo, Inc.[149] was such a case. *Shelton* similarly involved a Title VII employment discrimination class action. While the certification issue was still pending, the parties agreed upon a cash settlement of the individual claims of the captioned plaintiffs.[150] The district court ap-

note, however, that the parties' unfettered right to communicate with the putative class was to be tempered by "either party's right to seek any protective order which probable circumstances may make appropriate." *Id.* at 873, 212 Cal. Rptr. at 777.

144. *Magana,* 74 F.R.D. at 67.

145. Judge Bue suggested that rule 23(e) had "been accorded a flexible as opposed to a wooden interpretation by some courts and authorities." *Id.* (citing Elias v. National Car Rental Sys., Inc., 59 F.R.D. 276 (D. Minn. 1973); *Harvard Study, supra* note 1, at 1542 n.32; Wheeler, *supra* note 66, at 785).

146. *Id.* at 68.

147. *Id.* at 69. The court, however, did not *require* that the putative class be notified of the impending settlement. Rather, the court propounded interrogatories, sua sponte, and ordered the parties to respond within twenty days in an effort to ascertain whether the reliance interest of the putative class was sufficiently compelling to warrant notice. *Id.* at 70-71, 78-80.

148. The *Magana* court was unwilling to "speculate in the abstract as to the factual circumstances in a given case which might justify an exception to the notice requirement." *Id.* at 69. But the court intimated that evidence of the putative class' potential for reliance would militate in favor of notice. Significantly, "counsel's frank assessment as to the publicity, both formal and informal, attendant to th[e] suit" was to be accorded great weight in the court's notice equation. *Id.* at 79. The court acknowledged, however, that "recognition of this reliance interest presupposes that one or more class members ha[d] *actual knowledge* of the pending class action. If there has been little, if any, formal or informal publicity about the suit, then it is highly improbable that such an interest exists in fact." *Id.* at 70 (emphasis added).

The court also hinted that the defendant would have to overcome a rebuttable presumption that the plaintiff was being "bought off." "[T]he presumption should be that the spectre of abuse in an individual settlement and class dismissal at the pre-certification stage is sufficient to warrant notice to absent class members before court approval of any such arrangement." *Id.* at 69.

149. 582 F.2d 1298 (4th Cir. 1978).

150. *Id.* at 1301. The settlement agreement contemplated payment of $2,519.20 in satisfaction of the plaintiffs' claims. *Id.*

proved the dismissal, but concluded that rule 23(e) required that notice of the proposed settlement be given to members of the putative class.[151]

The court of appeals disagreed. Finding support in the *Weight Watchers* line of cases[152] and the *Sosna* dictum,[153] the court first noted that "[b]y its explicit language, Rule 23(e) is confined in operation to the settlement and dismissal of a 'class action.' "[154] Nevertheless, the court emphasized that the representative parties owed a fiduciary obligation to the putative class:

> [B]y asserting a representative role on behalf of the alleged class, these appellees voluntarily accepted a fiduciary obligation towards the members of the putative class they thus have undertaken to represent. They may not abandon the fiduciary role they assumed at will or by agreement with the appellant, if prejudice to the members of the class they claimed to represent would result or if they have improperly used the class action procedure for their personal aggrandizement.[155]

Consequently, the court found it necessary to posit a solution to the problem of abuse of the class action device without looking to the compulsory notice provision of rule 23(e).

The court found federal rule 23(d) to be an appropriate tool for combatting precertification abuse. Rule 23(d) empowers the district courts to "make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members *of any step in the action* . . . ."[156] Thus, according to the *Shelton* court, the district court had both the power and the duty under rule 23(d) to ensure that the named plaintiff did not settle his individual claim in a manner inconsistent with his assumed fiduciary duty or in a manner that would unfairly prejudice the absent class members he sought to represent.[157] Having concluded that rule 23(e) did not apply to settlements negotiated at the precertification stage, and in light of the unquestionably discretionary nature of the court's rule 23(d) powers,[158] the court had little difficulty in holding that

151. *Id.*

152. *See supra* notes 80-114 and accompanying text.

153. *See supra* notes 116-21 and accompanying text.

154. *Shelton,* 582 F.2d at 1303.

155. *Id.* at 1305 (footnotes omitted).

156. FED. R. CIV. P. 23(d)(2) (emphasis added).

157. *Shelton,* 582 F.2d at 1306. The *Shelton* court suggested that the lower federal courts, pursuant to rule 23(d), "have an ample arsenal to checkmate any abuse of the class action procedure, if unreasonable prejudice to absentee class members would result, irrespective of the time when the abuse arises." *Id.*

158. *See, e.g.,* Laventhall v. General Dynamics Corp., 91 F.R.D. 208, 210 (E.D. Mo. 1981) ("Notice as to a precertification class action dismissal under [rule] 23(d)(2) is discretionary."); Bantolina v. Aloha Motors, Inc., 75 F.R.D. 26, 33 (D. Haw. 1977) (same).

> [i]f . . . the court is clearly satisfied that there has been no abuse of the class action device and no prejudice to absent putative class members, it may approve the settlement and dismissal without going through with a certification determination or requiring notice to be given to absent putative class members.[159]

Magana and *Shelton* have spawned a discernible trend in the federal courts favoring a more flexible approach to the precertification settlement quandary.[160] These cases, whether based upon a less stringent

159. *Shelton,* 582 F.2d at 1314.

Accordingly, the court remanded to the district court with instructions to conduct a careful hearing to determine whether the settling plaintiff and his attorney had used the class action allegations to enhance their personal bargaining power, and to determine whether the possible reliance interest of the putative class was sufficiently compelling to warrant notification of the absentees. *Id.* at 1316. On remand, the district court ordered that notice of the proposed settlement be sent to the putative class despite the clear mandate of the court of appeals to the contrary. *See* Shelton v. Pargo, Inc., 81 F.R.D. 637, 641 (W.D.N.C. 1979). The lower court's decision apparently was informed by a misguided, though well intentioned, belief that it could not guard adequately against abuse by the parties or protect the reliance interest of the putative class without affording notice to the "class" and an opportunity to be heard. In any event, *Shelton's* unfortunate result on remand has not impaired significantly its precedential value. *See infra* note 160 and accompanying text.

160. *See, e.g.,* Gupta v. Penn Jersey Corp., 582 F. Supp. 1058 (E.D. Pa. 1984). The plaintiff, a former franchisee of the defendant, filed an antitrust action on behalf of himself and other similarly situated franchisees, alleging that the defendant had engaged in illegal "tie-in" sales in violation of the Sherman Act. The defendant counterclaimed for alleged nonpayment of royalties. Nine months after the suit was filed, and prior to a ruling on the plaintiff's motion to certify the class, the parties negotiated a settlement. *Id.* at 1059. Under the terms of the settlement, the plaintiff agreed to drop the class allegations, as well as his individual claims, in consideration of the defendant's dismissal of the counterclaim and payment of the plaintiff's attorneys' fees. *Id.*

The court, citing *Magana* and *Shelton,* first suggested that "notice to putative class members of a pre-certification dismissal or compromise is not *mandated* by Rule 23(e)." *Id.* at 1060 (emphasis added). The court nevertheless concluded that notice to the former Penn Jersey franchisees was required in order to vindicate the possible reliance interest of the putative class. *Id.* at 1061.

See also Simer v. Rios, 661 F.2d 655, 666 (7th Cir.) (agreeing with the Fourth Circuit "that the absolute notice requirement of Rule 23(e) is inapplicable to settled cases which have not been certified," but emphasizing that "district courts should scrupulously scrutinize the terms of settlement agreements for the impact on absent putative class members"), *cert. denied sub nom.* Simer v. United States, 456 U.S. 917 (1981); *In re* Fine Paper Litig., 632 F.2d 1081, 1087 (3d Cir. 1980) (citing *Shelton* with approval but declining to "address the broad question whether notice under Rule 23(e) is ever mandatory in the precertification stage"); Larkin Gen. Hosp. v. American Tel. & Tel. Co., 93 F.R.D. 497, 501-03 (E.D. Pa. 1982) (granting plaintiff's motion to dismiss without notice to the putative class after observing that no possible prejudice to the putative class could result since an identical action was pending in another district court); Sheinberg v. Fluor Corp., 91 F.R.D. 74, 75 (S.D.N.Y. 1981) (approving dismissal without notice when the asserted class was large and individual notice would be extremely costly, and where neither plaintiff nor her counsel received any payment for termination of the litigation); Jaen v. New York Tel. Co., 81 F.R.D. 696, 697-98 (S.D.N.Y. 1979) (approving settlement without notice after observing that the reliance interest of putative class was particularly remote); Wallican v. Waterloo Community School Dist., 80 F.R.D. 492, 493-94 (N.D. Iowa 1978) (finding the "functional approach to the notice element of Rule 23 to be a sound one"

reading of rule 23(e) or upon the court's rule 23(d) supervisory powers, share a single salient characteristic: they make notice to the putative class *discretionary* when the named plaintiffs seek to compromise their individual claims prior to the certification determination.

In recognition of this trend, the Litigation Section of the American Bar Association (A.B.A.) has proposed sweeping revisions of rule 23.[161] In particular, rule 23(e) would be amended to read as follows:

> DISMISSAL OR COMPROMISE. An action *filed* as a class action shall not be dismissed or compromised without approval of the court. An action *ordered maintained* as a class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to some or all members of the class in such manner as the court directs.[162]

The commentary of the A.B.A.'s Special Committee on Class Action Improvements (Committee Commentary) makes clear that "[t]here are sound reasons for requiring judicial approval of a proposal to dismiss or compromise an action filed . . . as a class action."[163] The Committee Commentary notes further, however, that "[t]he reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling . . . . If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the discretionary provisions of subdivision (d)."[164] In short, while the court approval requirement of proposed rule 23(e) would apply equally to all class actions, regardless of whether the class has been certified, the notice requirement would apply only to certified class actions. As in *Shelton,*[165] curtailment of rule 23 abuse and protection of the reliance

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and approving dismissal without notice after observing that "no danger of collusion between the parties or of a 'sell out' of the asserted class by plaintiffs appears to be present here"); Johnson v. Wentz Equip. Co., 18 Fair Empl. Prac. Cas. (BNA) 1499, 1503 (D. Kan. Dec. 22, 1977) (finding that settlement was not a product of collusion and that, in the absence of reliance, notice was not necessary to protect putative class members).

161. *See Report and Recommendations of the Special Committee on Class Action Improvements,* A.B.A. SEC. LITIG., 110 F.R.D. 195 (1986) [hereinafter *A.B.A. Report*]. The Committee, comprising class action practitioners and two federal judges, submitted its recommendations to the Council of the Section of Litigation, which approved the report. In July 1985, the A.B.A. House of Delegates authorized the Section of Litigation to transmit its recommendations to the Rules Advisory Committee of the Supreme Court, where the report currently is being studied by the Advisory Committee's reporter. *Id.* at 196. The report has not been approved or disapproved by the A.B.A. House of Delegates. *Id.*

While an extended discussion of the proposed rule is outside the scope of this Note, the proposed revisions effectively address many of the concerns that currently undermine the integrity and effectiveness of the class action device.

162. *Id.* at 203 (emphasis added); *cf. supra* text accompanying note 26.

163. *A.B.A. Report, supra* note 161.

164. *Id.*

165. 582 F.2d 1298, 1306 (4th Cir. 1978).

interest of the putative class would be accomplished by resort to rule 23(d).

The courts and commentators advocating a functional approach to the precertification settlement problem have recognized almost without exception that court approval plays an important role in deterring abuse of the class action device. On the other hand, notification of the alleged class is warranted only when the court determines that approval of the settlement proposal is likely to result in actual prejudice to the putative class members if they are not apprised of the action's dismissal. The federal courts have shown an increasing preference for this more flexible approach, but it remains to be seen whether California will follow the federal lead.

II. California's Approach to Precertification Settlements and Dismissals

Section 382 of the California Code of Civil Procedure,[166] which authorizes the class action device, does not provide for formal certification of the class. Nevertheless, the California courts have recognized the importance of making a threshold determination as to the propriety of class treatment and the composition of the class.[167] Increasingly, the California courts have utilized the procedures of federal rule 23 when there is no direct controlling California authority.[168] For instance, the courts routinely "certify" class actions in accordance with federal rule 23(c)(1),[169]

166. CAL. CIV. PROC. CODE § 382 (West 1973) provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

167. For example, in Cooper v. American Sav. & Loan Ass'n, 55 Cal. App. 3d 274, 127 Cal. Rptr. 579 (1976), the court observed,

> [A] primary procedural question in a class action is, who are the members of the class? *Prompt and early determination of the class is essential* because until the composition of the class has been determined defendants cannot tell what the action involves, and until members of the class receive notice of the action they will not be bound by any judgment in the action.

Id. at 284, 127 Cal. Rptr. at 584 (emphasis in original) (quoting Home Sav. & Loan Ass'n v. Superior Court, 42 Cal. App. 3d 1006, 1010, 117 Cal. Rptr. 485, 487 (1974)); *accord* Massey v. Bank of Am., 56 Cal. App. 3d 29, 32, 128 Cal. Rptr. 144, 146 (1976); *see also* Green v. Obledo, 29 Cal. 3d 126, 146, 624 P.2d 256, 268, 172 Cal. Rptr. 206, 218 (1981) ("[P]rocedural class-action issues—including the composition of the class—must ordinarily be resolved before a decision on the merits is reached.").

168. *See supra* note 21 and accompanying text.

169. *See, e.g., Green,* 29 Cal. 3d at 146, 624 P.2d at 268, 172 Cal. Rptr. at 218; City of San Jose v. Superior Court, 12 Cal. 3d 447, 453, 525 P.2d 701, 705, 115 Cal. Rptr. 797, 801 (1974); McGhee v. Bank of Am., 60 Cal. App. 3d 442, 447, 131 Cal. Rptr. 482, 484-85 (1976). For the text of federal rule 23(c)(1), see *supra* note 11.

and look to the tripartite scheme of rule 23(b) in determining whether notice of the pendency of the action is required.[170]

Additionally, federal rule 23(e) has been applied in at least one reported case in which the named plaintiffs sought to dismiss a defendant *after* the class had been certified.[171] Yet questions concerning the propriety of entering a dismissal or approving a settlement of the representative parties' claims prior to judicial recognition of the class nevertheless persist in California.

A. *La Sala v. American Savings & Loan Association*

La Sala v. American Savings & Loan Association[172] generally is regarded as the leading California case addressing court approval and notice in the precertification context. In *La Sala,* the plaintiffs brought a class action on behalf of themselves and other similarly situated borrowers, attacking the validity of a "due-on-encumbrance" clause[173] inserted in deeds of trust used by the defendant lender. They claimed that the challenged clause constituted an invalid restraint on alienation and sought an injunction against enforcement of the clause, as well as compensatory and punitive damages in an unspecified amount.[174]

After the suit was filed, but before obtaining a ruling on certification of the alleged class, the lender offered to waive enforcement of the challenged provision with respect to the named plaintiffs only.[175] The trial court then ruled, sua sponte, that the litigation presented "no justiciable issue," and removed the matter from its calendar.[176] Thereafter, the defendants moved to dismiss the action for lack of a representative plaintiff.[177] Despite the plaintiffs' insistence that the dismissal be accompanied by notice to the putative class, the court found that there

170. *See supra* note 21.

171. *See* Simons v. Horowitz, 151 Cal. App. 3d 834, 841-42, 199 Cal. Rptr. 134, 138-39 (1984) (plaintiff and defendant class action in which named plaintiffs, who had dismissed a member of the defendants' class in an apparent attempt to prevent him from filing an appeal, "were required to seek court permission for the dismissal . . . with notice and an opportunity to be heard given to all members of the defendant class").

172. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

173. The clause provided:

> Should Trustor sell, convey, transfer, dispose of or further encumber said property, or any part thereof, or any interest therein, or agree to do so without the written consent of Beneficiary being first obtained, then Beneficiary shall have the right, at its option, to declare all sums secured hereby forthwith due and payable.

Id. at 869, 489 P.2d at 1115, 97 Cal. Rptr. at 851. This provision permitted the lender to accelerate any outstanding payments on the principle in the event that the borrower executed a junior encumbrance on the secured property.

174. *Id.* at 868-70, 489 P.2d at 1115-16, 97 Cal. Rptr. at 850-52.

175. *Id.*

176. *Id.* at 870, 489 P.2d at 1116, 97 Cal. Rptr. at 852.

177. *Id.*

was "no individual plaintiff remaining who is or could be construed to be a representative of the class," and granted the dismissal without prejudice and without notice to the members of the alleged class.[178]

The California Supreme Court reversed, holding that "whenever dismissal of a class action stems from a defendant's grant of benefits to the representative plaintiffs, which are not provided to the class as a whole, the court may not dismiss the action without notice to the class . . . ."[179] Justice Tobriner, writing for the majority, first observed that a captioned plaintiff assumes a fiduciary obligation to the putative class members and thus, "surrender[s] any right to compromise the group action in return for individual gain."[180] Consequently, the duty to continue the action for the benefit of the putative class remains even if the named plaintiff receives all of the benefits that he sought in the complaint.[181]

Although the trial court had summarily dismissed the action after concluding that the representatives lacked any incentive to vigorously pursue the litigation, the supreme court reasoned that the defendant's waiver of the acceleration clause as to the named plaintiffs did not render the representatives "unfit per se to continue to represent the class."[182] Rather, before dismissing the action, the trial court should have given careful consideration to several factors relevant to the named plaintiffs' fitness to represent the class.[183] According to Justice Tobriner, a trial court could find that the named plaintiffs would continue to represent the class fairly and adequately even though they had already received the relief sought in their complaint.[184] Additionally, even if the court deemed the named plaintiffs unsuited to represent the class, the court nevertheless should have afforded them the opportunity to amend their

178. *Id.*

179. *Id.* at 868, 489 P.2d at 1115, 97 Cal. Rptr. at 851.

180. *Id.* at 871, 489 P.2d at 1116, 97 Cal. Rptr. at 852; *accord* Southern Cal. Edison Co. v. Superior Court, 7 Cal. 3d 832, 839, 500 P.2d 621, 625, 103 Cal. Rptr. 709, 713 (1972); Mallick v. Superior Court, 89 Cal. App. 3d 434, 437, 152 Cal. Rptr. 503, 505 (1979).

The United States Supreme Court declined to address this issue in Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 340 n.12 (1980) ("Difficult questions arise as to what, if any, are the named plaintiffs' responsibilities to the putative class *prior* to certification; this case does not require us to reach these questions."). *See supra* note 115 and accompanying text.

181. 5 Cal. 3d at 871, 489 P.2d at 1116, 97 Cal. Rptr. at 852.

182. *Id.*

183. *Id.* at 871-72, 489 P.2d at 1117, 97 Cal. Rptr. at 853. Chief among the factors that would militate against allowing the named plaintiffs to continue their representation was the possibility that the named plaintiffs' receipt of benefits, to the exclusion of the alleged class, would create an impermissible "conflict of interest" between the class and its would-be representatives. *Id.* at 872, 489 P.2d at 1117, 97 Cal. Rptr. at 853. Apparently, the court was concerned that the defendant might pressure the representatives to terminate the suit as a quid pro quo for a cash settlement.

184. *Id.* at 872, 489 P.2d at 1117, 97 Cal. Rptr. at 853. *See also Deposit Guar.*, 445 U.S. at 338-40 (named plaintiffs' potential entitlement to attorney's fees was sufficient interest to warrant their continued representation of the class).

complaint, redefine the class, or recruit an intervenor to pursue the action in their stead.[185]

The court then discussed the propriety of notifying the putative class if the foregoing options could not be implemented, and the action was in jeopardy of being dismissed for lack of a suitable representative. Recognizing that "no California statute or decision governs the dismissal of class actions generally,"[186] the court looked to the class action procedures of the federal rules. Finding support in both rule 23(e) and the procedural provisions of the Consumer Legal Remedies Act,[187] the court concluded that "dismissal of the action requires prior notice to the class."[188]

Under federal law, involuntary dismissal for lack of a suitable representative generally does not give rise to a duty to notify the putative class. The court recognized this,[189] but distinguished the plaintiffs' predicament on the ground that "the superior court did not find that plaintiffs were not, *at the commencement of the action,* proper representatives; instead, the court ruled that by reason of defendant's waiver" the named plaintiffs "were *no longer* suitable representatives."[190] Ultimately, however, the Court conceded that its holding essentially was result-oriented: "If we sanction [the lender's] tactic defendants can always defeat a class action by the kind of special treatment accorded plaintiffs here and thus deprive other members of the class of the benefits of the litigation and any notice of opportunity to enter into it."[191]

The result in *La Sala* is not necessarily inconsistent with the functional approach to precertification settlements advocated by many federal courts.[192] Although the court seemed inclined to impose a blanket notice requirement, its decision apparently was informed by the same

185. *La Sala,* 5 Cal. 3d. at 872, 489 P.2d at 1117, 97 Cal. Rptr. at 853.

186. *Id.* (citing Daar v. Yellow Cab Co., 67 Cal. 2d 695, 709, 433 P.2d 732, 742, 63 Cal. Rptr. 724, 734 (1967); Vasquez v. Superior Court, 4 Cal. 3d 800, 821, 484 P.2d 964, 977, 94 Cal. Rptr. 796, 809 (1971)).

187. CAL. CIV. CODE §§ 1750-1784 (West 1985).

The court specifically referred to section 1781(f), which provides that "[a] class action [brought under the Act] shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given in such manner as the court directs." Although the Act nominally applies only to consumer class actions, the courts have found its provisions persuasive even when the Act did not govern the case at bar. For a discussion of the Act and its relevance to the dismissal of class actions generally, see *supra* note 20 and accompanying text.

188. *La Sala,* 5 Cal. 3d at 873, 489 P.2d at 1118, 97 Cal. Rptr. at 854.

189. *Id.* at 872-73, 489 P.2d at 1118, 97 Cal. Rptr. at 854; *see* Bantolina v. Aloha Motors, Inc., 75 F.R.D. 26, 31 (D. Haw. 1977) (inability to maintain a class action due to lack of a suitable representative plaintiff does not constitute a "dismissal" for purposes of rule 23(e)).

190. *La Sala,* 5 Cal. 3d at 873, 489 P.2d at 1118, 97 Cal. Rptr. at 854 (emphasis in original).

191. *Id.*

192. *See supra* notes 135-60 and accompanying text.

remedial goals that underlie many of the federal cases construing rule 23(e)—namely, prevention of abuse, and protection of the putative class.[193] There was no indication in *La Sala* that the class action device had been employed by the plaintiffs for an improper purpose;[194] therefore, the imposition of notice could not be justified by the need to prevent abuse of the class action device.[195] Moreover, the court did not address specifically the extent to which other borrowers may have refrained from pursuing their individual claims in reliance on the named plaintiffs prosecution of the suit. Nevertheless, the court eschewed a formalistic approach to the precertification settlement problem, acknowledging that it had adopted a "flexible" approach towards the class action device in past decisions and implying that it would continue to do so in the future.[196]

In sum, *La Sala* stands for the proposition that the courts will not approve dismissals of class action suits if the named plaintiffs are to receive some benefit not made available, either directly or indirectly, to the putative class members.[197] Such a windfall, whether it results from a settlement agreement or from the unilateral acts of the defendant, would contravene the broad fiduciary duties that the representatives assume when they file a suit on behalf of a class. On the other hand, the appellate courts have not embraced the blanket notice requirement that the *La Sala* court purported to adopt, even in cases in which such notice arguably was warranted.[198]

Although *La Sala's* "notice prong" has never been overruled expressly, lower courts confronted with attempts to settle the claims of the captioned parties at the precertification stage have ignored uniformly the Supreme Court's announced requirement of notice and at least one case has implied that *La Sala's* notice requirement may be limited to the facts of that case.[199] The same cannot be said of *La Sala's* court approval requirement. With very few exceptions, the California courts have taken

193. *See supra* note 143 and accompanying text.

194. Although the defendant alleged that the real reason for the plaintiffs' insistence on notification of the putative class was to gain access to American's confidential loan files, the court was unpersuaded. *La Sala,* 5 Cal. 3d at 874 n.6, 489 P.2d at 1118 n.6, 97 Cal. Rptr. at 854 n.6.

195. *See* Almond, *supra* note 5, at 325 ("[I]t is by definition impossible for rule 23(e) notice to *deter* abuse that has already occurred in a pending case, or to undo abuse that has already been done.").

196. *La Sala,* 5 Cal. 3d at 883, 489 P.2d at 1125-26, 97 Cal. Rptr. at 861-62.

197. *See supra* note 179 and accompanying text.

198. *See infra* notes 214-19, 236 and accompanying text.

199. *See, e.g.,* Marcarelli v. Cabell, 58 Cal. App. 3d 51, 56 n.3, 129 Cal. Rptr. 509, 512 n.3 (1976) (parties who had petitioned court for dismissal of their yet uncertified class action were mistaken in their "assumption that *La Sala*'s holding that there can be no dismissal of a class action without notice to the class brooks no exception").

For a discussion of the *Marcarelli* case, see *infra* notes 203-19 and accompanying text.

an expansive view of their duty to ensure that class action settlements are fair and reasonable.

B. Post-*La Sala* Developments

In 1973, the Los Angeles Superior Court promulgated local rules governing class action procedures.[200] Superior Court rule 461, which essentially codifies *La Sala,*[201] provides that "[a] settlement will not ordinarily be approved if as a result thereof the class representative will receive some benefit not made available to the other members of the class."[202] The Superior Court Rules, however, do not address specifically the issues of court approval and notice to the putative class when a settlement of the representative parties' claims precedes the court's determination of the class' viability.

Several appellate court decisions nevertheless have construed the Superior Court Rules to require court approval of precertification settlements that seek to compromise the claims of the representative parties. For example, in *Marcarelli v. Cabell,*[203] the Second District Court of Appeal held that "a class action, *once filed,* may not be dismissed without court approval . . . ."[204]

The plaintiffs in *Marcarelli* filed a class action complaint against numerous individual and corporate defendants, alleging a massive real estate fraud involving recreational property. They claimed to represent a class of "several thousand persons."[205] Before the class was certified, the captioned parties negotiated a settlement of the plaintiffs' individual grievances. Thereafter, they filed a joint request for dismissal of the action; significantly, the terms of the settlement were not disclosed.[206] Pursuant to Superior Court Rule 470, which directs the county clerk not to process requests to dismiss class actions without prior court approval, the court clerk refused to enter the dismissal. The plaintiffs then filed a petition for a writ of mandate to compel the clerk to perform his "nondiscretionary" duty to dismiss.[207]

200. *See* SUPERIOR COURT RULES, *supra* note 21, rules 401-470. The Superior Court Rules generated some controversy when they were initially promulgated. Although there was concern that the Los Angeles courts would become a safe-harbor for defense lawyers seeking to subject proposed class action suits to the heightened scrutiny of the local rules, *see, e.g., Class Action Suits: A New Controversy,* L.A. Times, Jan. 13, 1973, § 1, at 1, col. 1, this concern failed to materialize, probably in large part due to the unifying influence of federal rule 23 on the state's courts.

201. *See supra* note 179 and accompanying text.

202. SUPERIOR COURT RULES, *supra* note 21, rule 461 (Nature of Class Action Settlement Hearings).

203. 58 Cal. App. 3d 51, 129 Cal. Rptr. 509 (1976).

204. *Id.* at 53, 129 Cal. Rptr. at 510 (emphasis added).

205. *Id.*

206. *Id.*

207. *Id.*

The court of appeal upheld the court clerk's refusal to enter the dismissal. The court noted that Superior Court Rule 470 "necessarily follows from the Supreme Court's holding in [*La Sala*], that '[w]hen a plaintiff sues on behalf of a class, he assumes a fiduciary obligation to the members of the class, surrendering any right to compromise the group action in return for an individual gain.' "[208]

The plaintiffs, who brought the mandamus action, advanced three possible theories supporting the dismissal of their class claims without the court's blessing. First, they argued that *La Sala* "held only that a defendant cannot, *over the plaintiff's objection,* achieve dismissal of an action brought as a class action by mooting the case as to the named plaintiffs."[209] Their situation was distinguishable because unlike the *La Sala* plaintiffs, they had no objection to the dismissal. The court found this argument unpersuasive:

> [I]n *La Sala* the named plaintiffs continued to speak for the class, even after the defendant offered them full satisfaction of their personal claims. Surely the plaintiffs in this case cannot make a virtue out of their basic difficulty: that, having settled their own claims, they no longer wish to act for the class they assumed to represent.[210]

Next, the plaintiffs contended that section 581 of the California Code of Civil Procedure[211] confers upon the plaintiffs an unconditional right to dismiss an action at any time prior to trial. The court disagreed, finding the plaintiffs' position "irreconciliable [sic] with the mandate of *La Sala*"[212] and suggesting that class actions were excepted from " 'the supposed absolute right to dismiss.' "[213]

The plaintiffs' final argument, and the court's puzzling response, is indicative of the failure of the California Courts to provide meaningful guidance to litigants seeking amicable resolution of their disputes and legitimate termination of their responsibilities to the putative class. The *Marcarelli* plaintiffs argued that, under *La Sala,* the trial court most likely would condition approval of their settlement with the defendants

208. *Id.* (quoting La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 804, 871, 489 P.2d 1113, 1116, 97 Cal. Rptr. 849, 852 (1971)).

209. *Id.* at 54, 129 Cal. Rptr. at 511 (emphasis in original).

210. *Id.* at 54-55, 129 Cal. Rptr. at 511.

211. CAL. CIV. PROC. CODE § 581 (West 1976) ("[a]n action may be dismissed . . . [b]y plaintiff . . . at any time before the actual commencement of trial, upon payment of the costs of the clerk or judge").

Section 581 was materially amended in 1986, partially in response to concerns about abuse of the class action device. Subdivision (j) now provides that "[n]o action may be dismissed which has been determined to be a class action under the provisions of this code unless and until notice that the court deems adequate has been given and the court orders the dismissal." CAL. CIV. PROC. CODE § 581(j) (West Supp. 1988). Unfortunately, the new statute suffers from the same defect as federal rule 23(e): it does not explicitly address the proper procedures when either or both of the parties seek a precertification dismissal.

212. *Marcarelli,* 58 Cal. App. 3d at 55, 129 Cal. Rptr. at 511.

213. *Id.* (quoting 4 WITKIN, CALIFORNIA PROCEDURE § 49, at 2713 (2d ed. 1971)).

on notification of the putative class.[214] The plaintiffs contended further that "judicial diseconomies and litigation inefficiencies inevitably would result from a rule requiring the trial court to withhold approval of a requested voluntary dismissal unless and until predismissal notice has been provided to the alleged class."[215] In essence, the plaintiffs urged the court to adopt a more flexible approach to the notification issue than that suggested by the *La Sala* court.

Ultimately, the court declined to rule on the propriety of notifying the putative class, remarking that "[w]hether an eventual dismissal will have to be preceded by notice to the [putative] class is a problem down the road."[216] Thus, the *Marcarelli* decision apparently is limited to upholding the validity of the court approval requirements of Superior Court Rule 470. The court's remarks, however, did suggest that it may have misapprehended the salutary function served, in an appropriate case, by precertification notice to the putative class.

For instance, the court's unsupported suggestion that federal rule 23(e) was inapplicable, because that rule dealt only "with dismissals and compromises intended to bind the entire class,"[217] does not acknowledge contrary authority,[218] and fails to address the possibility that putative class members may have a legitimate reliance interest in the maintenance of the suit. Moreover, this suggestion contradicts the holding in *La Sala.* There the supreme court, relying principally upon rule 23(e), ordered that the putative class be notified of the named plaintiffs' receipt of benefits from the defendant even though the putative class members were in no way bound by the defendant's shenanigans.[219]

214. *Id.* at 56, 129 Cal. Rptr. at 512. Indeed, such a result would follow from the holding in *La Sala*: "[W]henever the dismissal of a class action stems from a defendant's grant of benefits to the representative plaintiffs, which are not provided to the class as a whole, the court may not dismiss the action without notice to the class." 5 Cal. 3d 864, 868, 489 P.2d 1113, 1115, 97 Cal. Rptr. 849, 851 (1971).

215. *Marcarelli,* 58 Cal. App. 3d at 56, 129 Cal. Rptr. at 512.

216. *Id.*

217. *Id.* at 57, 129 Cal. Rptr. at 513.

218. *See, e.g.,* Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61 (S.D. Tex. 1977) (rule 23(e) applied to dismissal of uncertified class action with prejudice as to the named plaintiff only); Rothman v. Gould, 52 F.R.D. 494, 496 (S.D.N.Y. 1971) (same); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 482-83 (N.D. Ill. 1970) (same). *But see* Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, 455 F.2d 770, 775 (2d Cir. 1972) (rule 23(e) "does not bar non-approved settlements with individual members [of the putative class] which have no effect upon the rights of others"); Rodgers v. United States Steel Corp., 70 F.R.D. 639, 642 (W.D. Pa.) (same), *appeal dismissed,* 541 F.2d 365 (3d Cir. 1976); Nesenoff v. Muten, 67 F.R.D. 500, 502-03 (E.D.N.Y. 1974) (same).

219. *See supra* note 175 and accompanying text. The *Marcarelli* court's reluctance to require the parties to notify the putative class supports the argument that *La Sala's* "notice prong" is limited to its facts. *See supra* at notes 198-99 and accompanying text.

Superior Court Rule 470 also engendered a dispute in *Anthony v. Superior Court.*[220] There, the captioned parties jointly sought a writ of mandate to compel the trial court to dismiss their suit after negotiating a settlement agreement.[221] The class action in *Anthony* arose out of alleged defects in disc wheels manufactured by Kelsey-Hayes Corporation and sold by General Motors (GM) as optional equipment on several models of its trucks.[222] The plaintiffs, purchasers of trucks equipped with the allegedly defective wheels, brought an action on behalf of themselves and other GM truck owners. They sought to compel GM to undertake a "product safety recall" and pay for the replacement and installation of new wheels.[223] Additionally, the plaintiffs' complaint sought $157.5 million in compensatory damages for, among other things, depreciation in the value of the trucks, loss of use, inspection costs, and alleged unfair business practices; exemplary damages of $160 million also were sought.[224]

Before the purported class of GM truck owners was certified, the Department of Transportation brought a separate action against GM in a Delaware federal court, seeking to assess a $400,000 administrative fine against the car manufacturer for the wheel defect.[225] Pursuant to a consent decree in that case, GM recalled the designated trucks, agreeing to replace the defective wheels at no cost to their owners.[226]

The *Anthony* plaintiffs thereafter agreed to drop their class action suit without prejudice to the putative class in consideration of GM's reimbursement of $300,000 in attorneys' fees.[227] They claimed that the "primary relief" sought in their complaint—namely, replacement of the defective wheels—had been obtained as a result of the court-ordered recall campaign.[228] Consequently, the settlement agreement made no provision for the payment of money damages to either the named plaintiffs or the class of truck owners they claimed to represent.[229]

The trial court refused to dismiss the action. Despite GM's arguments that the plaintiffs' prayer for damages was "just window dressing,"[230] the court found the settlement "deficient" because it was "made

220. 59 Cal. App. 3d 760, 130 Cal. Rptr. 758 (1976).
221. *Id.* at 762-65, 130 Cal. Rptr. at 759-62.
222. *Id.* at 762, 130 Cal. Rptr. at 760.
223. *Id.*
224. *Id.* at 763, 130 Cal. Rptr. at 760-61.
225. *Id.* at 762-63, 130 Cal. Rptr. at 760.
226. *Id.* at 764, 130 Cal. Rptr. at 761.
227. *Id.*
228. *Id.*
229. *Id.* at 775, 130 Cal. Rptr. at 767-68. It bears noting that the settlement agreement that was submitted to the court for approval characterized the plaintiffs' claimed damages (which exceeded $300 million) as "of little, if any, significance . . . ." *Id.* at 775, 130 Cal. Rptr. at 768.
230. *Id.* at 766, 130 Cal. Rptr. at 762.

clearly in consideration of $300,000 to be paid by defendant to the attorneys for plaintiff class," and there had been "no showing that $300,000 adequately compensate[d] the class for its surrender of its several claims for money damages."[231] Additionally, the court noted that even "assuming that $300,000 would be a fair settlement of the class' money claims against the defendant, there is no showing that it is fair to appropriate the entire amount to the class' attorneys."[232]

The appellate court, quoting *Marcarelli*,[233] denied the *Anthony* petitioners' application for a writ of mandate and affirmed the lower court's refusal to enter the dismissal, holding that " 'a class action, once filed, may not be dismissed without court approval . . . .' "[234] The court's opinion focused primarily on the role of court approval in preventing settlement abuse:

> That the use of the device of a class action is subject to abuse in a number of ways is a well-known fact. . . . [I]t is the responsibility of the court to guard the integrity of the class action device as well as its own integrity . . . . "The present arrangement leaves the unfortunate impression that defendants are buying themselves out of a lawsuit by direct compensation of plaintiffs' counsel."[235]

Unfortunately, however, the court circumvented the notice issue, and declined to "reach the question of what would be required by way of notice to the class if the plaintiffs' proposed disposition of the action had otherwise been determined to be proper."[236]

With one notable exception,[237] the California courts have not delineated the circumstances under which putative class members should receive notice of proposed individual settlements at the precertification stage. Dictum in at least one recent appellate court decision suggests that the California courts may be moving away from the rigid, doctrinaire approach to precertification issues that characterized many of the early post-*Philadelphia Electric* federal cases.[238] It remains uncertain, however, whether the California Supreme Court eventually will favor a

231. *Id.* at 768, 130 Cal. Rptr. at 763.

232. *Id.* at 768, 130 Cal. Rptr. at 764.

233. *Marcarelli,* 58 Cal. App. 3d at 53, 129 Cal. Rptr. at 510.

234. *Anthony,* 59 Cal. App. 3d at 769, 130 Cal. Rptr. at 764 (quoting Marcarelli v. Cabell, 58 Cal. App. 3d 51, 53, 129 Cal. Rptr. 509, 510 (1976)).

235. *Id.* at 771-72, 130 Cal. Rptr. at 766 (quoting Jamison v. Butcher & Sherrerd, 68 F.R.D. 479, 484 (E.D. Pa. 1975) (footnote omitted)).

236. *Anthony,* 59 Cal. App. 3d at 772, 130 Cal. Rptr. at 766.

237. The exception is, of course, La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971). *See supra* notes 172-99. It has been suggested, however, that the holding of *La Sala* was essentially result-oriented. While the lower courts have followed *La Sala's* requirement of court approval whenever a class action dismissal is proposed, the "notice prong" has not been followed, suggesting that the notice aspect of the case may be limited to its facts. *See supra* notes 198-99, 219 and accompanying text.

238. *See* Malibu Outrigger Bd. of Governors v. Superior Court, 103 Cal. App. 3d 573, 579, 165 Cal. Rptr. 1, 3 (1980) (while plaintiffs have "no absolute right to dismiss their class ac-

functional approach to precertification issues, or whether the court will opt for a mandatory notice requirement in all class actions in which the representative parties seek to compromise their individual claims prior to class certification.

III. A Proposal for California

The federal courts have not reached a solid consensus on the precertification settlement issue. *Philadelphia Electric*[239] announced the broad rule that precertification settlements and dismissals must be accompanied by notice in order to combat what the court justifiably perceived as an attempt to auction off the rights of the whole class. Several of the lower federal courts enlarged this rule and required notice to the putative class, even in cases in which the contemplated settlements were without prejudice to the absentees. Although these courts have reached the correct result in some instances, they often have done so for the wrong reasons.

Another line of federal cases has recognized that notice is no panacea for the problem of class action abuse. The prospect of notifying an unknown and potentially unascertainable class can cripple an inoffensive settlement. On the other hand, notification of the putative class may be appropriate when there is a real danger that absentees with genuinely colorable claims have been lulled into inactivity by the actions of the class representatives. Consequently, California's approach to the precertification settlement problem should balance the considerable potential for abuse of the class action device against the need to promote amicable settlement of disputes whenever possible.

There is authority in California to support a requirement of court approval whenever a class action settlement is proposed, regardless of the stage of the proceedings at which such approval is sought.[240] Although federal rule 23(e), the Superior Court Rules,[241] and the current version of California's dismissal statute[242] address the dismissal of "class actions," subsequent decisions—in both California and the federal system—have construed the term broadly to include actions filed as class actions.[243]

In the absence of explicit statutory guidance, the California courts should continue to exercise their supervisory powers in reviewing the

tion[s] without hearing and notice to class members, a trial court should grant or deny the dismissal motion based upon the purpose to be served, to wit, the protection of the class").

239. 42 F.R.D. 324 (E.D. Pa. 1967); *see supra* notes 41-48 and accompanying text.

240. *See supra* notes 204, 234 and accompanying text.

241. *See supra* notes 200-02 and accompanying text.

242. CAL. CIV. PROC. CODE § 581(j) (West Supp. 1988); *see supra* note 211 and accompanying text.

243. For California cases that apply the court approval requirement to actions filed as class actions, see *supra* notes 204, 234 and accompanying text.

For federal cases similarly construing federal rule 23(e), see *supra* note 31 and accompanying text.

fairness and adequacy of proposed class action settlements; such a supervisory role will enable the courts to police abuses of the settlement process. When the proposed settlement is expressly without prejudice to the putative class, however, the parties should not be required to notify the absent class members unless the court determines that the absentees are actually and justifiably relying upon the pending suit as their sole means of obtaining legal redress. A rigid requirement of notice to putative class members when the named plaintiffs seek to compromise only their individual claims would discourage settlements in some instances and could generate its own peculiar brand of prefiling abuse.[244]

In the alternative, much of the uncertainty that currently undermines the precertification settlement process could be alleviated if California's recently amended dismissal statute[245] were amended further to conform substantially with the recommendations of the A.B.A.'s Special Committee on Class Action Improvements.[246] The amended statute might read as follows:

> No action *filed as a class action* may be dismissed unless and until the court approves and orders the dismissal, and notice of the proposed dismissal *may* be given to some or all members of the putative class in such manner as the court directs. No action that *has been determined to be a class action* under the provisions of this code may be dismissed unless and until notice that the court deems adequate has been given to some or all members of the class and the court orders the dismissal.

Such an approach, whether adopted by judicial fiat or legislative action, would govern the majority of precertification settlement cases and would furnish litigants with meaningful guidance when they seek nonadversarial resolution of their disputes and legitimate termination of their responsibilities to a putative class they no longer wish to represent.

IV. Conclusion

The discussion of class action settlement issues in California begins with the *La Sala* opinion. There, the California Supreme Court held that absent putative class members must receive notice of proposed class action dismissals if the captioned plaintiffs are to receive settlement benefits

244. *See* Almond, *supra* note 5, at 337. Almond, suggests that mandatory "precertification notice will provide plaintiffs with a powerful new weapon at the *prefiling stage,* because once the class action is filed the notice requirement deprives the defendant of the ability to settle privately with named plaintiffs." *Id.* at 314-15 (emphasis in original). And, according to the authors of the *Harvard Study,* "[m]easures designed to protect the interest of class members from sellouts by a class attorney and named plaintiffs may have the undesirable side effect of encouraging attorneys to attempt to negotiate individual settlements *before filing a complaint." Harvard Study, supra* note 1, at 1542 n.33 (emphasis added).

245. CAL. CIV. PROC. CODE § 581(j) (West Supp. 1988). *See supra* note 211 and accompanying text.

246. *See A.B.A. Report, supra* note 161, at 203. For the text of the recommended statute, see *supra* text accompanying note 162.

not made available to the class as a whole. *La Sala*, however, did not involve the typical precertification settlement in which the plaintiff and the defendant, after negotiating a settlement agreement, jointly seek a court approved dismissal. In *La Sala,* the defendants unilaterally granted the named plaintiffs the relief sought in their complaint in an apparent effort to moot the named plaintiffs' cause of action and render their continued representation of the class untenable.

Viewed in context, the directive of the *La Sala* court is not inconsistent with the functional approach to precertification settlements advocated in this Note. In *La Sala,* notice was ordered to counterbalance the sharp practice of the defendants. The proposed amendment would permit a trial court to craft an appropriate notice response when confronted with similar tactics at the precertification stage. Likewise, in the more typical consensual settlement area, the court would be free to direct that notice of the proposed settlement be given to some or all members of the putative class as warranted by the circumstances of the particular case. In accordance with settled due process principles, all settlement proposals would have to be conveyed to the class following certification.

As the law currently exists, the parties to proposed class action lawsuits cannot ascertain precisely what they are bargaining for when they sit down at the negotiating table. Statutory recognition of the consequences of certification would furnish a workable standard for litigants and for courts called upon to monitor the settlement process. By clarifying the current statutory regime, California could assume a leadership role in the area of class action procedure—the federal courts might well follow that lead.